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THE  
ONTARIO REPORTS

CASES DETERMINED IN THE SUPREME COURT  
OF ONTARIO (THE COURT OF APPEAL FOR  
ONTARIO AND THE HIGH COURT OF  
JUSTICE FOR ONTARIO).

L 8045

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CITED [1953] O.R.

REPORTED UNDER THE AUTHORITY OF THE  
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B.C.L., M.A.

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JUDGES  
OF  
THE SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS

*Chief Justice of Ontario.*

The Honourable JOHN WELLINGTON PICKUP (appointed 24th September 1952).

*Chief Justice of the High Court.*

The Honourable JAMES CHALMERS MCRUER (appointed a Justice of Appeal 14th October 1944; appointed Chief Justice of the High Court 28th December 1945).

*Puisne Judges.*

The Honourable HARRY DELL ANGER (appointed a Judge of the High Court 3rd April 1952; died 14th June 1953).

The Honourable HENRY ALDOUS AYLEN (appointed a Judge of the High Court 12th September 1950).

The Honourable JOHN BELL AYLESWORTH (appointed a Justice of Appeal 30th October 1946).

The Honourable FRED HOLMES BARLOW (appointed a Judge of the High Court 15th December 1942).

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The Honourable JOHN ANDREW HOPE (appointed a Judge of the High Court 11th September 1933; appointed a Justice of Appeal 28th December 1945).

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The Honourable JOHN LEONARD WILSON (appointed a Judge of the High Court 29th May 1945).

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### ERRATA AND CORRIGENDA.

Page 10. Substitute the following for the 7th, 8th and 9th lines of the last paragraph, and the footnote:

*Andrews & George Co. Ltd. v. Canadian Indemnity Co.*, [1951] 1 D.L.R. 783, reversed [1952] 1 D.L.R. 180, 4 W.W.R. (N.S.) 37, but later restored by the Supreme Court of Canada\*

\*Since reported *sub nom. Canadian Indemnity Co. v. Andrews & George Co. Ltd.*, [1952] 4 D.L.R. 690. Ed.

Page 13, last paragraph, lines 11-12, 14, 15, 20; page 14, line 3. For "appellant" read "respondent".

# REPORTS OF CASES

DETERMINED IN THE

## SUPREME COURT OF ONTARIO

1953

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[COURT OF APPEAL.]

Newman and Newman v. Terdik.

*Motor Vehicles—Liability of Owner—Whether Automobile Driven without Owner's Consent—Consent to Limited Use, not on Highway—Use on Highway—The Highway Traffic Act, R.S.O. 1950, c. 167, s. 50.*

Section 50 of The Highway Traffic Act deals only with liability for damage arising from the negligent operation of a motor vehicle on a highway, and in this context the words "without the owner's consent in the possession of some person other than the owner or his chauffeur" can refer only to possession on a highway. Consequently if the owner of a motor vehicle consents to its use by another person elsewhere than on a highway, but expressly prohibits its use on the highway, and the other person, despite that prohibition, takes the vehicle on to a highway, the owner is to be deemed not to have consented to the use of the motor vehicle on the highway, and is therefore not liable under s. 50 for damages arising out of the negligent operation of the vehicle by the other person. *Thompson v. Bouchier*, [1933] O.R. 525; *Marsh v. Kulchar*, [1952] 1 S.C.R. 330; *Hirshman v. Beal* (1916), 38 O.L.R. 40, applied.

AN APPEAL by the plaintiffs from the judgment of Smily J., dismissing the action.

5th November 1952. The appeal was heard by PICKUP C.J.O. and HOGG and F. G. MACKAY JJ.A.

*J. L. G. Keogh, Q.C.*, for the plaintiffs, appellants: Perkinson's original possession of the car on the morning in question having been with Terdik's consent, and his possession of it having continued without any break up to the moment of the accident, he was in possession of it with Terdik's consent, so as to make Terdik liable under s. 50 of The Highway Traffic Act, R.S.O. 1950, c. 167, even though the defendant had not consented to the particular manner of its operation at that time, that is, to its being operated by Perkinson on a public highway. [PICKUP C.J.O.: In other words, you say that if one obtains the physical possession with the consent of the owner, it makes no difference what use one makes of the car thereafter?] Yes.

The learned trial judge held that consent to the possession of the car on the farm was not consent to possession of it on the highway. [PICKUP C.J.O.: Was there any break in the physical possession of the car from the time Perkinson used it for his own work on the farm and the time when he took it on his own affairs?] No; he had the car all the time. The only thing against us is that Perkinson disobeyed the defendant's instructions. My submission is that only the obtaining of the physical possession counts. [MACKEY J.A.: Do you go so far as to say that if the possession was originally obtained with the owner's consent, and there is no break in the possession, it makes no difference when he obtained the possession?] Yes.

I rely on *Thompson v. Bouchier*, [1933] O.R. 525 at 528, 529, 533, 534, [1933] 3 D.L.R. 119; *Vancouver Motors U-Drive Limited v. Walker and Terry*, [1942] S.C.R. 391, [1942] 4 D.L.R. 399; *Mowe v. Perraton*, [1952] 1 All E.R. 423; *Lloyd v. Milton and Derkson*, [1937] 3 W.W.R. 504, reversed on other grounds, *sub nom. Derkson v. Lloyd*, [1938] S.C.R. 315, [1938] 3 D.L.R. 702; *Sebzda v. Hupka and Buchkowski*, [1950] 2 W.W.R. 165, [1950] 2 D.L.R. 185.

The deletion in 1929 of the words "at the time of such violation" showed a clear intention of the Legislature that the owner's consent need not relate to the time of the accident or the manner of operation of the car at that time, but is sufficient if it relates to the time when the driver originally obtains the possession. The legislative policy, as shown by the history of what is now s. 50, has been to enlarge the liabilities of an owner to an injured person, rather than to restrict them. Further, the deletion of these words renders obsolete all decisions before 1929, and the earliest Ontario decision that is still binding is *Thompson v. Bouchier*, *supra*.

Alternatively, Perkinson was Terdik's chauffeur and Terdik was responsible for his negligent driving, irrespective of consent, since part of the work for which he was paid was driving Terdik's car to and from tobacco kilns on the farm about twenty times a day: The Highway Traffic Act, ss. 1(1)(b), 50; *Clayton v. Raitar Transport Limited*, [1948] O.R. 897 at 900, 901, 902-3, [1948] 4 D.L.R. 877; *D'Alessandro et al. v. Minden*, [1943] O.R. 418 at 425-6, [1943] 4 D.L.R. 259. The law is not too clear on this point, but a chauffeur is one who operates a motor car and



receives compensation for so doing. [MACKEY J.A.: Would Perkinson have received less money if he had walked?] Not according to the evidence, but the witness was clearly prepared for the question by a long objection and argument.

In the further alternative, Terdik is responsible for Perkinson's negligence on the principle of master and servant. Perkinson was doing an act that he was authorized by his employer to do, *viz.*, driving the motor car, although he was driving it in an unauthorized or forbidden manner: *Canadian Pacific Railway Company v. Lockhart*, [1942] A.C. 591 at 599, 601, [1942] 3 D.L.R. 530, [1942] 3 W.W.R. 149, 54 C.R.T.C. 321; *Laycock v. Grayson et al.* (1939), 55 T.L.R. 698; *W. W. Sales Limited v. The City of Edmonton*, [1942] S.C.R. 467 at 471, [1942] 4 D.L.R. 196.

*F. J. L. Evans, Q.C.* (*D. E. W. Tisdale*, with him), for the defendant, respondent [instructed by the Court to argue on the first point only]: There was no express consent to Perkinson's use of the motor vehicle, and in fact there was an express prohibition. [PICKUP C.J.O.: We are of the view that it is established that Terdik had expressly prohibited the use of the car on the highway.] There is not an absolute liability under s. 50 merely because possession is given for a limited time. The important words in the section are "without the owner's consent" rather than "in the possession of some person". Possession can only be within the scope of the consent or authority: *Walker v. Martin* (1919), 45 O.L.R. 504, affirmed 46 O.L.R. 144, 49 D.L.R. 593. [PICKUP C.J.O.: That case refers to consent to the use of a car rather than to consent to its possession.]

The deletion of the words "at the time of such violation" did not change the meaning of the section, and we are therefore squarely within the decision in *LeBar v. Barber and Clarke*, 52 O.L.R. 299, [1923] 3 D.L.R. 1147.

*J. L. G. Keogh, Q.C.*, in reply: The section refers to consent to possession, not consent to operation. The latter part of the section is necessary to cover the case of a chauffeur who goes on a frolic of his own. "Deviation" cases have nothing to do with the question in this case. The important thing is that there was in fact consent to Perkinson's possession.

*LeBar v. Barber and Clarke, supra*, was concerned with consent to storage of a car. In any case the change in the wording of the section makes that case inapplicable. [MACKEY J.A.: The use of the word "chauffeur" in the section is difficult to reconcile with your interpretation. If your contention is correct there is no need to mention the chauffeur expressly.] It is a negative way of saying that the owner is liable in any circumstances if the car is in his possession or that of his chauffeur. The owner is liable if the chauffeur has the car even without the owner's consent—even if he steals it.

*Cur. adv. vult.*

9th December 1952. The judgment of the Court was delivered by

F. G. MACKEY J.A.:—This is an appeal from the judgment of Mr. Justice Smily dismissing the action, which is for damages resulting from an automobile accident.

The facts are fully set out in the judgment of the learned trial judge and may be briefly summarized as follows: The defendant was the owner of an automobile which was at the time of the accident being driven by one Perkinson. It was admitted that the negligence of Perkinson in the operation of the automobile was the sole cause of the accident which caused the injuries of the plaintiffs and the damage to the automobile of the plaintiff Maurice Newman.

The defendant, Terdik, was the owner of a tobacco farm on which there were two groups of kilns for drying tobacco. The two groups of kilns were approximately one-half mile apart and there was a farm lane connecting them.

Terdik had employed Perkinson, a United States citizen who ordinarily lived in North Carolina, as a tobacco-curer. The terms of the employment were that Perkinson should be paid his travelling expenses from North Carolina to Simcoe, Ontario, and the expenses of his return to North Carolina after completion of the tobacco-curing, the sum of \$90 per week and his board while working for Terdik. He commenced working on 4th August 1951, and 13th September 1951, the date of the accident, was his last day of employment. The tobacco kilns required very frequent inspections. After Perkinson's arrival, he complained that the distance between the two groups of kilns was too far to walk and an arrangement was made with Terdik that he was

to have the use of Terdik's automobile to travel between the two groups of kilns.

The learned trial judge found, on evidence which fully justified these findings:

(1) that Terdik gave Perkinson explicit instructions that he was to use the automobile only on the farm lane between the kilns and that he was not to go on the highway with the automobile;

(2) that, without the knowledge or permission of Terdik, Perkinson on the 13th September 1951, while visiting the kilns furthest from the farm buildings, took the automobile on to the highway and proceeded to Simcoe and thence to a point about four miles east of Delhi where the accident occurred; and

(3) that the business on which Perkinson was engaged when he took the automobile away from the farm and became involved in the accident was his own private business and was not in any way connected with his duties as an employee of Terdik.

It was argued by plaintiff's counsel, both at the trial and on appeal, that the defendant was liable on three grounds:

(a) that Perkinson was an employee of Terdik at the time of the accident;

(b) that Perkinson was the chauffeur of Terdik within the meaning of s. 50 of The Highway Traffic Act, R.S.O. 1950, c. 167; and

(c) that under s. 50, Perkinson having obtained possession of the car with the consent of the owner Terdik, the owner was liable for any damage caused by the negligent operation of the car while it was in Perkinson's possession irrespective of whether it was being used or operated contrary to the owner's express instructions.

The learned trial judge found against the plaintiffs on all of these grounds.

In regard to the first ground, the plaintiffs clearly cannot succeed once it has been held that he was not acting in the course of his duties as an employee of the owner at the time of the accident.

The second proposition is also untenable on the facts of this case. Perkinson was being paid as a tobacco-curer. The use of the car was only incidental to his employment and he was not receiving any additional wages or compensation for the



operation of the car: *D'Alessandro et al. v. Minden*, [1943] O.R. 418, [1943] 4 D.L.R. 259.

On the third ground, the plaintiffs' argument is that, Perkinson's original obtaining of possession of the car on the morning in question having been with Terdik's consent, and his possession of it having continued without any break up to the moment of the accident, he was in possession of it with the defendant's consent so as to make the defendant liable under s. 50 of The Highway Traffic Act, even though the defendant had not consented to the particular manner of its operation at the time, that is, to its being operated by Perkinson on a public highway.

It was argued that, because prior to 1929 the predecessor section of the present s. 50 of The Highway Traffic Act contained the words "at the time of such violation", (a) all decisions prior to 1929 were obsolete, and (b) the deletion of these words showed a clear intent of the Legislature that the owner's consent need not relate to the time of the accident or the manner of operation of the car at that time but was a sufficient consent if it related only to the time when the driver obtained possession of the motor car.

I do not think that the deletion of these words affected the meaning of the section. Prior to 1929, s. 41 of R.S.O. 1927, c. 251, made the owner liable for penalties under the Act and also made him liable for damages provided they arose by reason of a violation of the Act or regulations. From 1930 on there were separate sections dealing with liability of the owner for penalties and his liability for damages. These sections are now ss. 49 and 50 of the present Highway Traffic Act. The words "at the time of the violation" are still contained in s. 49. It is obvious that the word "violation" is not appropriate for use in s. 50 as there may be civil liability without breach of any specific provision of the Act or regulations.

Section 50 deals only with liability for damage arising by reason of the negligent operation of a motor car *on a highway*. Used in this context, the words "without the owner's consent in the possession of some person other than the owner or his chauffeur" can only be referable to possession on a highway.

That the deletion of the words "at the time of such violation" did not affect the meaning of the section was the view taken by Mr. Justice Masten in his dissenting judgment in the case of



*Thompson v. Bouchier*, [1933] O.R. 525 at 533, [1933] 3 D.L.R. 119, where he said:

“While sec. 41(a) does not contain the words ‘unless at the time of such violation,’ yet nevertheless, in my opinion, the crucial moment is the instant when the negligence occurs. . . .

“Further reasons for the view which I have expressed arise from the consideration of the words of the statute itself. The statute creates liability in the owner only ‘by reason of negligence in the operation of such motor vehicle *on a highway*.’” (The italics are mine.)

The other members of the Court in that case did not deal with this point as it was held that there was consent to drive on a highway.

The meaning of the word “possession” was discussed in *Thompson v. Bouchier* and recently in *Marsh v. Kulchar*, [1952] 1 S.C.R. 330, [1952] 1 D.L.R. 593. I think it is clear from the reading of these cases and of *Hirshman v. Beal* (1916), 38 O.L.R. 40 at 51, 32 D.L.R. 680, 28 C.C.C. 319, that possession can change from rightful possession to wrongful possession, or from possession with consent to possession without consent, without any change in the actual physical possession of the chattel. In *Hirshman v. Beal* Mr. Justice Masten refers to the definition of theft as set out in s. 347 of The Criminal Code, R.S.C. 1927, c. 36, particularly subs. 4, which is as follows:

“It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of conversion, in the lawful possession of the person converting.”

This was also the law in cases of conversion under the common law.

Whether the owner of a motor car has satisfied the onus of showing that his car at the time of the accident was on the highway in the possession of some other person without his consent is a question of fact to be determined on the evidence in each case, and in this case I think the learned trial judge, on the evidence that Terdik not only had not consented to Perkinson using his car *on the highway* but had expressly forbidden such use, was right in holding that there was no consent to the use of his motor car within the meaning of s. 50 of The Highway Traffic Act.

In coming to these conclusions, I have read the following cases referred to us by counsel in the course of argument:

*LeBar v. Barber and Clarke*, 52 O.L.R. 299, [1923] 3 D.L.R. 1147; *Hirshman v. Beal*, *supra*; *Wainio v. Beaudreault*, 61 O.L.R. 356, [1927] 4 D.L.R. 1131; *Kuhmo and Laakso v. Helberg*, [1931] O.R. 630, [1931] 4 D.L.R. 323; *Thompson v. Bouchier*, *supra*; *Vancouver Motors U-Drive Limited v. Walker et al.*, [1942] S.C.R. 391, [1942] 4 D.L.R. 399; *Mowe v. Perraton*, [1952] 1 All E.R. 423; *Lloyd v. Milton and Derkson*, [1937] 3 W.W.R. 504, reversed *sub nom. Derkson v. Lloyd*, [1938] S.C.R. 315, [1938] 3 D.L.R. 702; *Sebzda v. Hupka and Buchkowski*, [1950] 2 W.W.R. 165, [1950] 2 D.L.R. 185; *D'Alessandro et al. v. Minden*, *supra*; *Clayton v. Raitar Transport Limited*, [1948] O.R. 897, [1948] 4 D.L.R. 877; *Lockhart v. Stinson and Canadian Pacific Railway Company*, [1941] S.C.R. 278, [1941] 2 D.L.R. 609, 52 C.R.T.C. 161, affirmed *sub nom. Canadian Pacific Railway Company v. Lockhart*, [1942] A.C. 591, [1942] 3 D.L.R. 530, 54 C.R.T.C. 321, [1942] 3 W.W.R. 149; *Laycock v. Grayson et al.* (1939), 55 T.L.R. 698; *W. W. Sales Limited v. The City of Edmonton*, [1942] S.C.R. 467, [1942] 4 D.L.R. 196; *Bickell v. Blewett* (1931), 40 O.W.N. 136; *Hamilton et al. v. Rodgers et al.*, [1949] O.W.N. 156; *Herron v. Langford et al.*, [1949] O.W.N. 753; *Battistoni v. Thomas et al.*, [1932] S.C.R. 144, [1932] 1 D.L.R. 577; *St. Helens Colliery Company Limited v. Hewitson*, [1924] A.C. 59; *Goh Choon Geng v. Lee Kim Soo*, [1925] A.C. 550, [1925] 2 W.W.R. 439; *Moreau v. Labelle*, [1933] S.C.R. 201, [1934] 1 D.L.R. 137; *Bennetto et al. v. Leslie and Werby*; *Sykes v. Leslie and Werby*, [1950] O.R. 303; *Malbouf v. The King*, [1948] Ex. C.R. 523, [1948] 4 D.L.R. 171; *Marshall v. Mulvie and Fulford*, [1937] O.W.N. 690; *Walker v. Martin* (1919), 45 O.L.R. 504, affirmed 46 O.L.R. 144, 49 D.L.R. 593.

The plaintiffs also appeal on the ground that the damages assessed were inadequate. On the evidence I cannot find that the learned trial judge erred in principle in assessing the general damages he did and, although they seem somewhat low having in mind the very serious injuries suffered by the plaintiffs, they are not so inadequate as to warrant interference by this Court.

I would therefore dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiffs, appellants:* Bench, Keogh, Rogers & Grass, St. Catharines.

*Solicitors for the defendant, respondent:* Walsh & Evans, Hamilton.

[COURT OF APPEAL.]

**Excel Cleaning Service v. Indemnity Insurance Company  
of North America.**

*Insurance—Contractor's Liability Policy—Terms of Exclusion—Property  
"in the care, custody or control of" Insured—"On location" Cleaning  
Service.*

The plaintiff operated an "on location" cleaning service, in the course of which it caused damage to a rug that was then being cleaned in the home of its owner. The owner obtained a judgment against the plaintiff, which now claimed to be indemnified by the defendant under the terms of a "Contractors Liability Policy". The defendant relied on a clause in the policy excluding damage to property "in the care, custody or control of the insured".

*Held*, the exclusion was inapplicable and the defendant was liable. The words "care", "custody" and "control", as used in the exclusion, involved actual physical possession by the insured of the property damaged, and there was not such possession here. The rug remained throughout in place in the home of its owner, and the plaintiff and its employees had no right even to move it without special permission.

*Pleadings—Amendment—Leave of Court—Discretion to be Exercised.*

While much indulgence is granted to an applicant for leave to amend a pleading if no prejudice is suffered by the opposite party and proper compensation can be made by costs, nevertheless leave is not given as a matter of right. The circumstances of each case must be considered and such order must be made as may be deemed proper in the exercise of judicial discretion.

AN APPEAL by the defendant from a judgment of Factor Co. Ct. J., of the County Court of the County of York, in favour of the plaintiff.

10th and 12th November 1952. The appeal was heard by LAIDLAW, ROACH and F. G. MacKAY JJ.A.

*Gordon N. Shaver, Q.C.*, for the defendant, appellant: In construing an insurance policy the Court must read the policy as a whole and determine the coverage, and then determine to what extent the exclusions cut down this coverage. In the case at bar it is necessary to determine the meaning of the words "care, custody or control".

As to the meaning of "care" I refer to 22 Corpus Juris Secundum, 1940, p. 1144; *Markham v. Town of Middleton* (1925), 129 A. 524 (care is equivalent to supervision); *Koury v. Providence-Washington Ins. Co.* (1929), 145 A. 448 at 450 (care does not imply physical dominion).

As to "custody" see 25 Corpus Juris Secundum, 1941, p. 70; *United States v. Dibella* (1928), 28 F. 2d 805 at 806. [ROACH J.A.: If this company had broken a chandelier while cleaning the rug the policy would have covered it, but you say that it does



not cover damage to the rug itself?] Yes. The policy applies to everything except the operations of the insured. Temporary physical control does not require dominance, supremacy or authority: *Monroe County Motor Co. et al. v. Tennessee Odin Ins. Co.* (1950), 231 S.W. 2d 386 at 395.

As to the word "control" I refer to the many reported cases dealing with the words "care or control" in s. 285(4) of The Criminal Code, R.S.C. 1927, c. 36, as amended; also 18 Corpus Juris Secundum, 1939, p. 28; *Lessard v. Hull Electric Company*, [1947] S.C.R. 22, [1947] 3 D.L.R. 371; *Ex parte Tyler*; *Tyler v. German Congregational Church of Zion of Butte et al.* (1939), 293 N.W. 512; *Hopkins et al. v. Howard's Ex'x.* (1936), 99 S.W. 2d 810 at 812; *Guidici v. Pacific Automobile Ins. Co.* (1947), 179 P. 2d 337; *Randazo et al. v. United States* (1924), 300 F. 794. [ROACH J.A.: Suppose a cleaning company had contracted to clean walls, and damaged the walls. Would this policy indemnify the company?] The cases distinguish between real and personal property, and that case might be argued either way. If the damage was to real property the exclusion probably would not apply. [ROACH J.A.: If a rug was damaged while walls were being cleaned, what would be the result?] If the work is covered by the policy it does not make any difference what is damaged. The policy covers every liability except what is excluded, if it is associated with the cleaning. [LAIDLAW J.A.: In reading the whole exclusion clause does not the word "custody" necessarily involve possession?] It was held in the *Monroe County Motor Sales Co.* case, *supra*, that custody meant charge, or merely temporary physical control.

In the alternative, I ask leave to amend the statement of defence and submit that exclusion "a" applies, because the plaintiff, the insured, impliedly assumed liability for the damage to the rug by entering into the cleaning contract, as there was by law an implied term that the work would be carried out without injury to the rug and other articles to be cleaned: *Andrews & George Company Limited v. Canadian Indemnity Company*, 4 W.W.R. (N.S.) 37, [1952] 1 D.L.R. 180, reversing [1951] 1 D.L.R. 783\*. [ROACH J.A.: There was no assumption of liability by the insured here.] [LAIDLAW J.A.: The liability was imposed on the plaintiff by judgment.] I admit that this is a purely technical and legal argument.

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\*Since reversed *sub nom.* *Canadian Indemnity Co. v. Andrews & George Co. Ltd.*, [1952] 4 D.L.R. 690. Ed.



The rule *verba chartarum fortius accipiuntur contra proferentem* is frequently misunderstood; it merely means that words should be construed in the sense in which a prudent and reasonable man on the "other side"—i.e., the side to which the policy is proffered—would understand them: *English v. Western*, [1940] 2 K.B. 156 at 167, [1940] 2 All E.R. 515; *Andrews & George Company Limited v. Canadian Indemnity Company*, *supra*; *Woolfall and Rimmer, Limited v. Moyle et al.*, [1942] 1 K.B. 66, [1941] 3 All E.R. 304. The Court must not create an ambiguity or magnify one where there is no real difficulty: *Richardson Construction Company Limited v. London and Lancashire Guarantee and Accident Company of Canada*, 6 I.L.R. 97, [1939] 2 D.L.R. 738. If the words of an exclusion are reasonably clear the exclusion must be construed according to its express terms: *London and Lancashire Fire Insurance Company, Limited v. Bolands, Limited*, [1924] A.C. 836 at 848.

*J. H. Osler*, for the plaintiff, respondent: It is not proper to rely on exclusion "a" for the first time in this Court, since that clause has not been relied on or even suggested at any earlier stage of the proceedings. The whole trial proceeded upon the basis that the sole point in the case was whether or not this rug was in the "care, custody or control" of the plaintiff. In any event, the *Andrews & George Company* case, *supra*, is wholly inapplicable, since it dealt with a contract for the sale of goods, and the warranty implied in such a contract.

The trial judge was right in holding that there was an ambiguity and that therefore the policy should be construed in our favour. If it had been the intention of the insurer to limit the coverage in the way that has been argued here, it would have been quite feasible to do so in plain words. The policy in coverage B expresses a wide coverage and range of benefits. These benefits should not be cut down by a condition inserted later in the policy among other conditions of minor importance. There is an obligation upon an insurer who intends to limit a risk expressed in general terms to make the limitations perfectly clear to the insured: *Woolfall and Rimmer, Limited v. Moyle et al.*, *supra*; *Metal Stampings Limited and Lush v. The Standard Life Assurance Company*, [1951] O.W.N. 625.

*Gordon N. Shaver, Q.C.*, in reply.

10th December 1952. The judgment of the Court was delivered by

LAILAW J.A.:—This is an appeal by the defendant from a judgment pronounced by His Honour Judge Factor on the 13th March 1952, after trial at the non-jury sittings of the County Court of the County of York at the city of Toronto on the 12th and 13th March 1952, by which judgment it was directed that the plaintiff recover from the defendant the sum of \$500 and costs.

The plaintiff is a partnership and carries on the business of general household cleaning, including cleaning of walls, floors, furniture, rugs, etc. It was described in evidence as an "on location cleaning service". On or about the 5th November 1951 employees of the plaintiff attended at the residence of John Hatheway King, 31 Kingsgarden Road, in the township of Etobicoke, to clean several pieces of furniture and a broadloom rug. The rug was nailed to the floor and also held there by a quarter-round strip of wood. It remained in place during the work of cleaning it. During the prosecution of the work, and arising out of it, damage was caused by accident to the rug. The plaintiff denied liability for the damage claimed by the owner and after trial of an action in the County Court of the County of York judgment was given for the owner against the plaintiff in the present action for \$450 and costs. The plaintiff thereupon commenced this action in the County Court of the County of York and claimed that under the terms of a contract of insurance issued by the defendant to the plaintiff the plaintiff was entitled to be indemnified against the amount of the judgment and costs given against it in favour of the owner of the rug.

The policy of insurance is called a "Contractors Liability Policy". It was in force at the time of the accident and the defendant agreed with the insured thereunder, subject, *inter alia*, to the exclusions of the policy, as follows:

"Coverage B—Property Damage Liability

"To pay on behalf of the *insured*, provided premium is charged under Coverage B in the declarations, all sums which the *insured* shall become obligated to pay by reason of the liability imposed upon the *insured* by law for damages because of injury to or destruction of property, including the loss of

use thereof, arising out of the work of the *insured* and during the prosecution thereof, caused by accident, including accidents occurring after completion or abandonment of the operations and arising out of pick-up or delivery operations or the existence of tools, uninstalled equipment and abandoned or unused materials, or occurring elsewhere if caused by an employee of the *insured* while engaged in the performance of his duties for the *insured* in connection with the work at such locations."

Under the heading "Exclusions" it was agreed as follows:

"This policy does not apply:

"(a) to liability assumed by the *insured* under any contract or agreement; . . . .

"(g) to damage to or destruction of property owned, rented, occupied or used by or in the care, custody or control of the *insured*."

At the trial and in this Court the appellant contended that at the time of the accident the rug was "in the care, custody or control of the *insured*", within the meaning and scope of para. g above quoted. I cannot give effect to the skilful argument of counsel for the appellant. It is my opinion that the words "care", "custody" and "control", as used in para. g involve actual possession of the property that was the subject of damage. "Care" in the sense in which it is used in the paragraph is synonymous with "safekeeping"; "custody" imports some authority over the property; "control" supposes physical possession of property over which control may be exercised. The appellant did not assume the care, custody or control of the property or the responsibilities incidental thereto and the owner did not transfer or surrender such care, custody or control to the appellant. Indeed I think the appellant had no right, without special permission or authority from the owner, to remove any of the quarter-round strip or any nails holding the rug to the floor or to alter the position of the rug in any way or otherwise exercise control in respect of it in the course of cleaning. The appellant and its employees were simply "on location" in the house of the owner of the rug for the purpose of doing certain specific work. The mere fact that they were engaged there in the performance of that work did not give them the care, custody or control of the property on which the work was being done.



A different conclusion would lead to results that were not intended by the parties to the contract of insurance. Thus, for instance, if the services of the appellant were engaged by an owner to clean the walls of a room and a carpet nailed to the floor of it, the appellant would be liable for damage caused by accident to the wall only because that property plainly was not "in the care, custody or control of the insured"; the appellant would not be liable for damage to the rug because, if the argument of counsel for the appellant were accepted, that property was "in the care, custody or control of the insured"; and if damage was caused to both the wall and the rug, the appellant would be liable for damage to property of one class, namely, the wall, but not to property of another class, the rug.

The exclusion clause, para. g in the policy, should not be so construed that it is applicable to one class of property and not to another. No such distinction is warranted from a reading of the whole clause and it is not proper to sever the phrase "in the care, custody or control of the insured" from the whole clause in which those words appear and endeavour to interpret them without regard to the context. When the whole clause is read and considered, it appears to me to support the view that actual possession of property is involved and is a necessary incident of each case excluded from the policy coverage.

After presenting argument on the question I have discussed, counsel for the appellant asked the Court for leave to argue that the appellant was not liable under the policy by reason of the exclusion contained in para. a thereof quoted above. Counsel for the respondent opposed the application and showed that the trial proceeded on the clear understanding that there was only one point in the case. He directed attention to the record of the proceedings and I quote what was then said by counsel for the defendant (now appellant):

"MR. SHAVER: There is only one point in it [the case]. We say there is an exclusion in the policy which says that the insurance company is not to be liable if the damage is to personal property while the personal property is in the care, custody or control of the assured, and we say the rug which was damaged in this case was in the care, custody or control of the assured when it was damaged. That is the sole point in the case."



Counsel for the respondent maintained that he relied upon the statement made by counsel for the defendant and conducted the trial on behalf of his client on the understanding disclosed therein; that it would not now be fair to his client to be called upon to meet a new defence that might and probably would require further evidence. He directed attention also to the fact that the claim of his client is to be indemnified by the defendant for the amount of a judgment of the Court.

While much indulgence is granted to an applicant for leave to amend a pleading in cases where no prejudice is suffered by an opposite party and proper compensation by way of costs can be made, nevertheless such leave is not given by the Court as a matter of right. The circumstances of each case must be considered and such order must be made as may be deemed proper in the exercise of judicial discretion. In the instant case I would not grant the leave asked for by counsel for the appellant. Therefore, I express no views on the question whether or not clause a of the exclusions in the policy is applicable to the circumstances of the case.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, respondent: Jolliffe, Lewis & Osler, Toronto.*

*Solicitors for the defendant, appellant: Shaver, Paulin & Branscombe, Toronto.*

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[McRUER C.J.H.C.]

**Insurance and Discount Corporation Limited v. Motorville  
Car Sales.**

*Chattel Mortgages — Mortgage on Trader's Stock-in-trade — Implied Authority to Mortgagor to Deal with Goods in Ordinary Course of Business, and to Give Good Title — Limits of Authority — Test to be Applied.*

A trader who mortgages his stock-in-trade under a chattel mortgage has an implied authority or licence to deal with the mortgaged goods, and to give a good title to a buyer, but only in the ordinary course of his business. There is no implied authority to deal fraudulently with the goods so as to give a good title to one who buys them in the course of the fraudulent dealing but without notice of the fraud. The test is not whether the buyer, or a reasonable man in the position of the buyer, would think that the sale was made in the ordinary course of the seller's business, but whether it was in fact within the implied authority or licence.

*Chattel Mortgages — Form — Mortgage to Incorporated Company — Form and Contents of Affidavit of bona fides — The Bills of Sale and Chattel Mortgages Act, R.S.O. 1950, c. 36, ss. 4, 7, 15, 16.*

Technical objections, fully set out in the reasons for judgment, were raised to chattel mortgages sued on herein, particularly to the affidavits of *bona fides*. *Held*, the objections could not succeed. The mortgages and affidavits sufficiently complied with the relevant statutory provisions.

AN ACTION to recover possession of three motor vehicles, or for damages for conversion.

3rd to 6th November 1952. The action was tried by McRUER C.J.H.C. without a jury at Toronto.

*H. G. Chappell*, for the plaintiff.

*H. F. Parkinson, Q.C.*, and *W. J. Anderson*, for the defendant.

11th December 1952. McRUER C.J.H.C.:—The plaintiff is a finance company, a part of whose business is to lend money to used car dealers on chattel mortgages and to discount lien notes given to secure the balance of the purchase-price of used cars sold by used car dealers to members of the public. Paul LaFlamme carries on business as a used car dealer in the city of St. Catharines under the name of Motorville Car Sales.

The claim in this action is to recover possession of three motor vehicles which were encumbered by duly registered chattel mortgages in favour of the plaintiff made by one Scarrow, a used car dealer in the city of Toronto, on the 12th April 1951, the 29th May 1951, and the 21st June 1951 respectively.

The facts are not involved. Scarrow carried on his business under the name of Trans-Canada Motors on Pape Avenue on a lot which had a capacity of from 22 to 25 motor vehicles (which

I shall refer to as cars), from November 1950 until he absconded in June 1951.

The system under which the plaintiff carried on business with Scarrow was to take chattel mortgages on specified cars. A mortgage taken might cover one car for a stated amount, or several cars for specific amounts allocated to each car, or the mortgage might cover several cars for a total amount. An amount was allocated against each car described in a mortgage, in a control account kept by the plaintiff. When a car was sold Scarrow paid the plaintiff the amount shown to be owing with respect to the particular car sold and it was struck off the control account. It was rare that a discharge of a mortgage was asked for or given, but all mortgages contained the following clause:

"It is agreed that every article, whether severable or not, covered hereby shall stand charged with the whole of the principal money and interest hereby secured and that no person shall have any right to require that the mortgage monies be apportioned. The mortgagee may from time to time release or discharge any article or any other security from these presents without any or sufficient consideration as it shall see fit. No such release or discharge shall release or diminish or prejudice the mortgagee's security as against any article remaining undischarged or released nor shall it prejudice any covenant herein contained or release any insurer or guarantor or any other person whomsoever."

At no time did the plaintiff hold a blanket mortgage on Scarrow's entire stock-in-trade, but on the average it held mortgages of the character I have described on approximately 50 to 75 per cent. of the cars Scarrow had in stock. The plaintiff had no reason to doubt Scarrow's integrity until the events giving rise to this action occurred. From time to time an audit clerk employed by the plaintiff would check the cars on Scarrow's lot as well as those on the lots of other used car dealers with whom the plaintiff did business. This was for the purpose of determining that no cars had been sold on which the plaintiff held mortgages without the amount due on the mortgages being paid.

On the 21st June 1951 Scarrow's lot was checked and it was found that a 1951 Chevrolet motor car on which the plaintiff had advanced \$1,900 had been sold or was in the process of



being sold. In place of the mortgagor requiring this sum to be paid in cash Scarrow gave a chattel mortgage to secure the sum of \$1,900 covering 9 cars as set out in a schedule thereto attached, and amounts were allocated against each car, varying from \$100 to \$400. On the 19th June Scarrow had given a cheque to the plaintiff for \$350 to pay off the amount owing on a car he had sold. This cheque was deposited in the plaintiff's bank on the 20th June and was returned on the 25th June as there were not sufficient funds in Scarrow's bank account to meet it.

On Friday the 22nd June, Scarrow, who was known to Mr. LaFlamme as a used car dealer in the city of Toronto, came to Mr. LaFlamme's lot in St. Catharines with a woman he introduced as his wife but who is not his wife, and offered for sale at the price of \$1,000 a 1948 Chevrolet coach, which he was driving. Mr. LaFlamme's evidence is that he agreed to purchase the car that day for the amount asked, and at the same time Scarrow offered for sale a 1941 Dodge coupe and a 1951 Ford truck for \$550 and \$1,300 respectively. Scarrow was allowed to take the Chevrolet car away and he returned the following day with the same woman and delivered the Chevrolet car and on that day Mr. LaFlamme agreed to purchase the Dodge car and the Ford truck if they were in as good condition as the Chevrolet car. A cheque dated the 22nd June 1951 for \$1,000, signed by Mr. LaFlamme and payable to Trans-Canada Motors was filed as an exhibit, together with a form called a "Bill of Sale" bearing the same date, covering the Chevrolet coach. This document contains the following declaration:

"I further represent and declare that I am the sole owner of the said vehicle, or merchandise, described above, and that the same is free and clear of all liens and encumbrance whatsoever, and that the same is subject only to liens and encumbrances, if any, listed as follows: NONE"

On Saturday the 23rd June Scarrow offered Mr. Borland, a used car dealer in the city of Toronto, five or six cars on his lot. Mr. Borland agreed to purchase them and gave a cheque for \$1,000 as a deposit. He searched for liens and, finding them to be encumbered, demanded the return of his money, with the result that Scarrow took three cars to Hamilton on Monday the 25th June and Mr. Borland went with him. Scarrow sold



two of these cars to a used car dealer in Hamilton (these are the subject of another action) and on Tuesday the 26th June Mr. Borland received a cheque from Scarrow for \$1,000 at a motel in the outskirts of Hamilton.

On Saturday the 23rd June Mr. Sinick visited Scarrow's lot and found only a few old cars on the lot.

On the night of Sunday the 24th June Scarrow registered with a woman as his wife at a motel at Stoney Creek, near Hamilton.

On Monday the 25th June Scarrow returned to the defendant's lot accompanied by the same woman who had accompanied him before, and delivered to Mr. LaFlamme the Dodge sedan and Ford truck. Mr. LaFlamme gave Scarrow a cheque payable to Trans-Canada Motors for \$1,850. This cheque was certified and apparently cashed on the same day. A so-called bill of sale covering the Dodge sedan and the Ford truck was taken by Mr. LaFlamme, containing a declaration as to liens and encumbrances similar to the one covering the Chevrolet car previously delivered.

Mrs. Scarrow was at no time with her husband in St. Catharines in June 1951 and did not stay with him at the motel on the night of the 24th June. She last saw him on Saturday the 23rd June. She talked to him on the telephone on Monday the 25th June, and on Wednesday the 27th June she received a letter from him dated the 26th June enclosing a money order for \$1,000 and stating that she would never see him again. Since then she has not seen him.

The main defence is that Scarrow sold the cars and the truck purchased by the defendant in the ordinary course of business, that the purchase was *bona fide* on the defendant's part and that being so the defendant is relieved from liability notwithstanding the existence of the chattel mortgages.

Mr. LaFlamme stated that it is not unusual for used car dealers to sell used cars in what is referred to as "wholesale lots" and he says he has on different occasions bought cars from other dealers. His evidence was that of the used cars he sold he bought 50 per cent. from other dealers, about 80 per cent. of which would be from dealers holding franchises to sell new cars.

Mr. Lyon, the assistant manager and credit manager of the plaintiff, said that the basis on which the plaintiff dealt with used car dealers was that although the cars subject to chattel mortgage were specifically charged in the plaintiff's accounts with the amount advanced against each car, the dealer was permitted to sell a car covered by a chattel mortgage without consulting the plaintiff, but was expected to pay the amount charged against it in a few days. He said he did not expect a dealer to sell cars to another dealer for resale, since a large part of the plaintiff's business was discounting lien notes taken on the sales of cars to individual purchasers and the evidence is that the plaintiff would not finance a dealer who did not discount with it the lien notes received from retail sales. I accept the evidence that the plaintiff had no knowledge that Scarrow at any time sold any cars to persons other than retail purchasers and there is no evidence that he contemplated sales to other dealers when any of the mortgages were given to the plaintiff on the cars in question. However, I do not consider this to be fundamental to the decision I have come to in this case.

There is no question in my mind that the sales made to the defendant were not sales made in the ordinary course of Scarrow's business. They were made fraudulently for the purpose of converting the entire proceeds to his own use. In the course of committing the fraud he made false declarations in writing that there were no liens or encumbrances on the cars. He was unquestionably selling off his best cars for the purpose of absconding, quite irrespective of the terms of the chattel mortgages on them.

It is contended, however, that notwithstanding this, if the transaction appeared to Mr. LaFlamme, or would appear to an ordinary person engaged in the trade, to be in the ordinary course of business, and he acted *bona fide*, the plaintiff's action must fail. The following extract from Mr. LaFlamme's evidence sets out with reasonable accuracy his position:

"Q. You were not very intimately acquainted with Scarrow? You only had one transaction with him? A. That is right, but I had seen him.

"Q. You were not intimately acquainted with him? A. No.

"Q. When he came over with three cars to sell you would be rather on your guard, would you not, lest there should be liens on them? A. Not from another dealer, your Honour.

“Q. Were you just taking a chance that because he was a dealer there would be no liens on them? A. I guess that is part of our business to take a chance. We can’t check everybody. Especially from another dealer, it is very rarely we check on him.

“Q. It was not very hard to check on this one as soon as you got suspicious? A. No, it was easy then.

“Q. It would be easy to check with the credit bureau, would it not, on anyone? A. If a person was the least bit suspicious, it is very easy, your Honour.

“MR. PARKINSON:—Q. I take it from that answer that you were not the least bit suspicious of Scarrow in this case? A. Not the least bit because it is something we do all the time.

“Q. You said something to his Lordship, that it is the nature of your business to take chances? A. That is so.

“Q. You did not take chances in this individual case as distinguished from your business generally? A. No, that is right.

“Q. I am sorry if I was leading. A. If he would have been a private individual from Toronto I didn’t know, then we would check it completely from one end to the other, but not as a dealer.”

I have grave doubt that the sale of these cars was made to Mr. LaFlamme in such a manner that an ordinary person with his experience would consider that they were being sold in the ordinary course of business.

Scarrow, a dealer in used cars, was peddling them in St. Catharines. It is said that used car dealers sell cars to other dealers in other localities because they may be over-stocked in a particular make or a particular model, but there is no evidence of any such explanation being given by Scarrow in this case. Mr. LaFlamme had in his mind the subject of liens, because he took a declaration from Scarrow that they were not subject to any lien or encumbrance. He says, however, that his suspicions were not aroused until he discovered that his cheque had been certified on Monday. He then got in touch with the St. Catharines credit bureau and ascertained very quickly the facts with respect to the plaintiff’s mortgages.

In view of these facts I now proceed to consider the law. The principles to be applied may be different where the chattel mortgage in question is in the nature of a blanket mortgage



covering the entire stock-in-trade of a merchant or the chattels and growing crops of a farmer from those cases where a chattel mortgage is given on specific vehicles forming part of the dealer's stock-in-trade, but I do not think that difference is one that it is necessary to consider in this case.

There is no question that where a mortgagor mortgages property, *e.g.*, stock-in-trade or farm crops, under a chattel mortgage, the law implies a condition in the mortgage that the mortgagor is to be permitted to sell the mortgaged chattels in the ordinary course of the business to which they are incident and to give a good title to the purchaser notwithstanding that the property in the chattels is in the mortgagee. This implied authority is referred to in some of the cases as "an implied term" or "an implied licence". Mr. Parkinson argues that the test to be applied, as to whether a purchaser gets a good title or not, is whether the purchaser believed, or at least whether a reasonable man in the purchaser's position would have believed, that the sale was in the ordinary course of business. With great respect, I do not think that this contention is supported by authorities of long standing. I think the test is—What is the "implied term" of the chattel mortgage or the "implied licence", and was the sale *in fact* made within the implied term or licence? This view of the law appears to me to be quite clear if the decided cases are reviewed and considered in their chronological order.

*Cochrane v. Rymill* (1879), 40 L.T. 744, is a judgment of the Court of Appeal in England on a case stated by Lord Chief Justice Coleridge. By a memorandum of agreement the plaintiff let on hire certain cabs to one P. Subsequently the plaintiff made an advance of a sum of money to P, taking as security a bill of sale on all his goods. Neither the agreement to hire nor the bill of sale was registered under The Bills of Sale Act. P took the goods, all of which were included either in the agreement to hire or in the bill of sale, to the defendant and instructed him to sell them. The defendant, being without notice of the plaintiff's claim, advanced money to P upon the goods, sold them by auction, and after deducting expenses and commission paid over the balance to P. In an action brought to recover the value of the goods on the ground of their alleged conversion by the defendant it was held that the plaintiff was entitled to



recover for the dealing with the property, and that the sale by the defendant amounted to a conversion of the goods. Bramwell L.J. said at p. 746: "A plaintiff is entitled to say to a defendant, You have undertaken to deal with my goods as though you had a right to sell them or deal with them; I am not going to take the trouble to trace each one of them, but I look to you for the value of them. I am of opinion that here there was the clearest act of conversion, and the judgment must be affirmed."

This case merely forms a background leading up to the decision in *National Mercantile Bank, Limited v. Hampson* (1880, Feb. 24), 5 Q.B.D. 177. The plaintiffs were holders of a bill of sale duly registered, covering, among other things, all the growing crops and all the goods, chattels, and effects which then were or thereafter should be on or about the farm and premises of S, a farmer. S sold to the defendant 12 quarters of wheat covered by the bill of sale. The defence was that the plaintiffs suffered S to have possession of the goods and to hold himself out as having not only the possession but the property in them, and that he sold the same to the defendant who bought them in the ordinary course of business and without notice that they did not belong to S. The plaintiffs demurred and it was argued that having duly registered the bill of sale the plaintiffs were under no obligation to give notice that the goods covered by it were their property; neither were they bound to prevent the grantee from carrying on his business. It was argued that the defendant bought the goods from one who could convey no title to them, and must take the consequences. Counsel for the defendant was not called on. Lush J. said: "I think the defence is good, and that the action cannot be supported. Having regard to the terms of the bill of sale, there was an *implied license* for the grantor to carry on his business, and to sell the wheat, and any bona fide purchaser from him would have a good title." It is to be emphasized that the language used is that "there was an implied license for the grantor to carry on his business", and what was apparently meant was to carry on his business in its ordinary course and to sell the wheat in the ordinary manner. This interpretation I think is warranted by the later decisions.

This case was followed in *Walker v. Clay* (1880, Mar. 5), 49 L.J.C.P. 560, 42 L.T. 369. The chattel mortgage in question was given by an innkeeper and horse-dealer who was so described in the chattel mortgage. It covered household effects, horse saddles and other accoutrements and also certain named horses, together with carts and trade fixtures, as well as all other goods, chattels and effects on the message. The trial judge held that the intention of the bill of sale was that the grantor should be at liberty to carry on his trade of an innkeeper and horse-dealer by the sale of his stock-in-trade, and that the plaintiff could not succeed in an action in detinue brought against the purchaser of one of the horses covered by the chattel mortgage.

On appeal Grove J. stated that the case could not be distinguished from *National Mercantile Bank, Limited v. Hampson*, *supra*. At p. 562 he said: "The grantor of the bill of sale was an innkeeper and horse dealer, and we must take it to be found that this horse was sold *in the ordinary course of his business*. The object of the bill of sale was to permit the grantor to carry on his business as innkeeper and horse dealer, and it must therefore be taken to have contemplated *this* sale." (The italics are mine.)

Lindley J. said at p. 562: "The first thing we have to consider is the true construction of the bill of sale and the real meaning and object of it. . . . The object of the bill of sale is obviously not to paralyse the trade of the grantor, but to enable him to carry on his trade, and the bill would be worthless if we were to construe it otherwise." And he went on to say: ". . . and it would be, to my mind, contrary to the intention of the parties to construe that covenant as a covenant not to sell *in the ordinary course of business*, for it would paralyse the business and destroy the value of the security. I think, therefore, that the covenant not to remove is a covenant that the grantor will not remove or dispose of the goods *otherwise than in the ordinary course of his trade*." (The italics are mine.) And again he said: "Taking all the provisions of this bill together, the object of it is plainly to let the grantor carry on his business *in the ordinary way*. . . ." Referring to *National Mercantile Bank, Limited v. Hampson*, the learned justice said: "The *ratio decidendi* of that case appears to be that if the holder of a bill of sale allows the grantor to continue

his business he allows him to dispose of the goods comprised in the bill of sale, *in the ordinary course of business.*" (The italics are mine.)

In *Taylor v. M'Keand et al.* (1880), 5 C.P.D. 358, B, a trader, assigned all his stock-in-trade by a bill of sale with a proviso that until default in payment of the money advanced B should be entitled to make use of such stock without hindrance or disturbance on the part of the grantee. B afterwards sold the goods to the defendants by private contract, and absconded. The jury found that B sold the goods fraudulently, and not in the ordinary course of his business; but the defendants did not know this, and bought the goods *bona fide*. Judgment was entered for the plaintiff and a rule nisi for a new trial was obtained on the grounds of misdirection. The argument presented to the Court on behalf of the defendants in support of the rule nisi was precisely the same argument presented by Mr. Parkinson before me. It was argued that at the time the defendants bought the goods B was in possession of them, with the consent of the plaintiff, appearing to the world as the owner and entitled to deal with them; no demand having then been made, consequently there was no default. It was contended that the finding that the defendant bought the goods *bona fide* and in ignorance of any fraud on the part of B was most material, and that it was a fundamental principle that if one of two innocent persons must suffer by the wrongful act of a third, he who by his conduct enabled that third person to do the wrong must bear the loss. It was argued that the learned trial judge ought to have told the jury that if the defendants purchased the goods *bona fide* and without a knowledge of what was passing in the mind of B the plaintiff must fail.

After setting out the jury's findings, at p. 360 Lord Coleridge said: "They were the goods of the plaintiff by a perfectly valid contract,—a contract which is by statute declared invalid only as against certain persons of whom the plaintiff is not one. That amounts to a parliamentary recognition of the goodness of the plaintiff's title to the goods. How is that got rid of? It is said that a bill of sale of stock-in-trade, when the trade is to be carried on, must always be subject to an implied condition that the grantor shall have liberty to deal with the goods for the purposes of the business; and that, if that were not so, it would



stop the business altogether, which would be contrary to the intention of the parties. But, in expressing that condition, the law ingrafts upon it this limitation, *that the business must be carried on bonâ fide, and the disposition of the goods must be bonâ fide and in the ordinary course of business.*" (The italics are mine.)

The learned Lord Chief Justice then went on to interpret the judgment of Lush J. in *National Mercantile Bank, Limited v. Hampson*, *supra*, and concluded: "Lush, J., in giving judgment, says: "There was an implied licence for the grantor to carry on his business and to sell the wheat.' *Here the defendants have bought property of another which the vendor had no right to sell, because he did not sell it in the only way in which he could sell, viz. in the ordinary course of business.*" (The italics are mine.)

In *Payne v. Fern* (1881), 6 Q.B.D. 620, a bill of sale was given by one Griffin to secure the sum of £26 due by him to the plaintiff. Before the indebtedness was discharged Griffin sold and delivered off his premises to the defendant the cattle, goods, and chattels. An action was brought against the defendant to recover the goods. The action was tried by a jury. Watkin Williams J. directed the jury to find for the plaintiff if they thought that the sale to the defendant was not a sale made in the ordinary course of business. Field J., with whom Manisty J. concurred, referred to *National Mercantile Bank, Limited v. Hampson* and *Taylor v. M'Keand et al.* At p. 621 he said: "With regard to such part of that property as consists of stock-in-trade, it may be, that according to the cases cited, there is an implied condition that the grantor shall be at liberty to deal with it in the ordinary course of his business. But the jury have found that the sale to the defendant was not in the ordinary course of business, and the plaintiff had therefore a right to demand that the defendant should give up the goods and, upon his refusal, to bring this action. The plaintiff had under the circumstances both the property in and a right to possession of the goods."

*Musgrave v. Stevens and Bradbury* (1883), Cab. & El. 38, was a case tried by Field J. without a jury. By bill of sale Stevens, a tenant of the plaintiff, assigned his growing crops, farm implements, and other goods, chattels, and effects in and



about his house and premises to the defendant Bradbury. Stevens was insolvent and sold wheat for the purpose of paying the incoming valuation due the landlord. At p. 39 Field J. said: "The real question is 'Was the sale within the implied licence contained in the bill of sale?'"

After referring to *National Mercantile Bank, Limited v. Hampson* and the judgment of Lord Coleridge in *Taylor v. M'Keand et al.*, he said: "These two cases taken together lay down what are the terms to be implied", and went on to hold that the sale was not a sale in the ordinary course of business. At p. 40 he said: "The licence is a sort of trust. You assume that as tenant he will use his goods for a proper purpose. The discretion of the man of business in carrying on his business is implied, and Stevens had no idea that he was carrying on his business by assenting to this sale."

In *Joseph v. Webb*; *Joseph v. Lyons*; *Joseph v. Pidcock*; *Joseph v. Jones* (1884), Cab. & El. 262, the plaintiff was a wholesale jewel merchant and manufacturer; the defendants Webb and Lyons were pawnbrokers; the defendant Pidcock, a solicitor; and the defendant Jones, an accountant. One Manning had for many years carried on business as a retail jeweller in Worcester. He incurred heavy liabilities and transferred his business to the plaintiff, who paid off his existing liabilities, took the business at Worcester into his own hands, and carried it on under the name of "Manning & Co.", employing Manning as his business manager. The business was subsequently sold back to Manning on payment of £2,000, the balance being secured by way of bill of sale which was duly registered. Manning carried on the business on his own account and dealt with the plaintiff for goods in the way of his trade. He also dealt with other manufacturers and wholesale dealers from whom he obtained large quantities of goods. Unknown to the plaintiff he raised money from time to time by pledging portions of his stock with the defendants and other persons. The goods so pledged consisted of articles included in the bill of sale and some acquired subsequent thereto. Among other things it was alleged on the part of the defendants that the goods were pledged with them with the knowledge and by the permission and authority of the plaintiff. There was no express consent or proof of actual knowledge or permission. Huddleston B., after referring to

*National Mercantile Bank, Limited v. Hampson, Taylor v. M'Keand et al., and Payne v. Fern*, said at p. 267:

"I was clearly of opinion that the obvious understanding of both parties being that the trade should continue, Manning would be fully justified in dealing with the goods in the ordinary course of his trade, and that there would be an implied authority to that effect.

"But the defendants further contended that pawning the goods was in the ordinary course of Manning's trade; that was a proposition that I emphatically declined to accept, and held that the pledging of the stock-in-trade by a retail jeweller for temporary advances was not within the ordinary course of dealing in his trade and business. The defendants further pleaded that the plaintiff permitted Manning to have the goods in his possession and to deal with same in such a manner that the defendants were induced by the plaintiff's conduct to believe, and did in fact believe, that Manning had authority to pledge the same. This was what they called the standing-by doctrine, and they urged that as plaintiff had paid off previous pledges in 1876, he must have been aware of this subsequent course of conduct of Manning. I however find as a fact that the plaintiff had no express knowledge of these pledgings by Manning, and that he did not permit Manning to deal with the goods as Manning did. This standing-by doctrine must be subject to the proof that the plaintiff had knowledge of what Manning was about to do."

The basic case relative to this matter in Canadian jurisprudence is *Dedrick et al. v. Ashdown et al.* (1888), 15 S.C.R. 227. Although the matter for decision was not precisely the same point as is before the Court in this case, and what was said in the judgments may be *obiter*, I think, as Masten J.A. thought in his dissenting judgment in *Nourse v. Canadian Cannery Ltd., infra*, that I should follow it. In *Dedrick et al. v. Ashdown et al.*, the question for decision was whether the mortgagee of chattels could justify a seizure made under the mortgage. The chattel mortgage covered the stock-in-trade and business effects of a trader. There was a proviso to the effect that if the mortgagor should attempt to sell or dispose of the mortgaged goods the mortgagee might take possession of the same as in case of default of payment. At pp. 241, 243 and 244 Gwynne J. discusses some of the cases to which I have referred.

In referring to *Walker v. Clay*, he says, at p. 243: "It was the *fact* of the sale having been made in the ordinary course of the grantor's business that, although there was no express proviso in the instrument that he might continue to carry on his business, made the purchaser's title good although the vendor had not the property in the thing sold."

After referring to *Taylor v. M'Keand et al.* and the fact that, the jury having found the goods to have been sold with a fraudulent intent by the mortgagor and not in the ordinary course of business, the purchaser could not maintain title against the mortgagee although the purchaser was ignorant of the fraud and bought *bona fide*, he said: "*. . . thus showing that the title of the purchaser depends on the fact of the sale to him being made in the ordinary course of the vendor's business.* A trader, mortgagor in possession of chattels, has no right whatever to sell otherwise than in the ordinary course of his business, but to sell in the ordinary course of his business he has, from the very nature of a chattel mortgage and the purpose for which it has come into use among traders. So that on a sale made in the former case a purchaser cannot acquire title but in the latter he can." (The italics are mine.)

And he refers to *Payne v. Fern*, *supra*, and goes on to say: "These authorities abundantly establish that a right of the mortgagor to retain possession of the mortgaged property until default may be gathered by implication from the terms of the instrument as well as from an express proviso contained therein."

At p. 244 he refers to the language of Lindley J. in *Walker v. Clay* as showing that the object of the mortgage of the stock-in-trade of a trader is not to effect a winding-up of his business or "to paralyze his trade", but to enable him to carry on his business *in the ordinary course of his trade*.

Counsel for the defendant strongly relies on *Campbell & Co. Ltd. v. Steele* (1930), 39 O.W.N. 317, and on *Nourse v. Canadian Cannery Ltd.*, [1935] O.R. 361, [1935] 3 D.L.R. 168.

In the former case Garrow J. held that the defendant took a good title to a Hudson car bought from a used car dealer who had pledged the car to the plaintiff with seven other cars under a chattel mortgage. I do not think this case assists the defendant. At p. 319 Garrow J. stated: "That defence is . . . that the



sale to the defendant was a sale in the ordinary course of business; and that the defendant in making the purchase acquired a good title to the car." He went on to say: "The evidence supports this defence, and the authorities favour it." This constituted a finding of fact that the sale in question was made in the ordinary course of business and that finding of fact having been made undoubtedly the authorities I have referred to supported the defence.

Likewise, in the latter case, the finding was that the sale of the crop covered by the chattel mortgage was made in the ordinary course of business. At p. 365 the learned County Judge stated: "I think the law is clear that in chattel mortgages of that type there is an implied term that the mortgagor may carry on his business and sell the mortgaged property in the usual course of his business. If he does sell, the purchaser gets good title free and clear of any claim by the mortgagee."

At p. 376 Middleton J.A., after referring to *Dedrick et al. v. Ashdown et al.*, *supra*, said: "There, in a chattel mortgage there was no re-demise clause, but the Court held that there was an implied contract that the mortgagor should remain in possession, and should be at liberty to carry on business in the ordinary course of trade and to sell and dispose of the mortgaged goods in such a way as to give good title to a purchaser."

And at p. 387 Masten J.A., in a dissenting judgment, but in interpreting *Dedrick et al. v. Ashdown et al.*, said: "... and it was held by the majority of the Court that this proviso only prohibited the sale of the goods other than in the ordinary course of business."

The irresistible conclusion from all these cases is that a trader who mortgages his stock-in-trade under a chattel mortgage has an implied authority or licence to deal with the mortgaged goods, but that authority is limited to dealing with them in the ordinary course of his business, and nothing more. The goods are the property of the mortgagee and I can find no suggestion in any case that such a trader has an implied authority to deal fraudulently with the goods so as to give a good title to purchasers who purchase them in the course of the fraudulent dealing but without notice of the fraud, while, on the other hand, *Taylor v. M'Keand et al.*, *Payne v. Fern*, *Musgrave v. Stevens and Bradbury*, and *Joseph v. Webb*, read



together with *Dedrick et al. v. Ashdown et al.*, are all decisions against such a proposition. In this case the sale of the plaintiff's cars was not within the authority implied by law, and therefore Mr. LaFlamme's protection against such an event was to search for chattel mortgages before paying over his money and the result is that he must bear the loss.

Mr. Parkinson argued that the affidavits of *bona fides* were defective by reason of the fact that they were made by Mr. Lyon, who is described in the affidavits as "Credit Manager".

The Bills of Sale and Chattel Mortgages Act, R.S.O. 1950, c. 36, s. 4, provides for the affidavit of *bona fides* and s. 7 provides that if the mortgage and affidavits are not registered as by the Act provided the mortgage shall be absolutely null and void as against subsequent purchasers in good faith and for valuable consideration.

Section 15(2) provides: "If the mortgage or conveyance is made to a corporation the affidavit may be made by the president, vice-president, manager, assistant manager, secretary or treasurer, or by any other officer or agent thereof authorized to do so by resolution of the directors."

Section 16 provides: "The authority in writing referred to in section 15 or a copy of such authority, shall be attached to and filed with the mortgage or conveyance."

There was no authorization in writing purporting to clothe Mr. Lyon with authority to swear to the affidavit of *bona fides* attached to and filed with the mortgage. However, I am satisfied on the evidence that Mr. Lyon was, in fact, the assistant manager of the plaintiff company. The by-laws of the company were not available for production. This was not due to fault on the part of the plaintiff's solicitors, or the defendant's solicitors, who formerly acted for the plaintiff. Mr. Shortt, the president and general manager of the plaintiff company, swore that Mr. Lyon came to the company as assistant manager and credit manager and has since occupied those offices. That being true, although the affidavits of *bona fides* describe him as "Credit Manager", when they were sworn Mr. Lyon was in fact the assistant manager. Mr. Parkinson did not argue that if I should hold that Mr. Lyon was assistant manager the mere fact that he was described in the affidavit as credit manager would invalidate the affidavit.

Mr. Parkinson also argued that the affidavits of *bona fides* were defective in that para. 2 in each one reads for example as follows:

"THAT the Grantor named in the within Bill of Sale by way of Mortgage, therein and hereinafter called the Mortgagor is justly and truly indebted to the Mortgagee in the sum of \$900.00. The said amount set forth in the said Bill of Sale by way of Mortgage as being the consideration therefor *is a present advance being made by the Mortgagee to the Mortgagor is due or accruing from the Mortgagor to the Mortgagee.*" (The italics are mine.)

The marginal note on the printed form used is "Strike out inappropriate words". Mr. Parkinson argues that the two italicized statements remaining in the mortgage are conflicting and that there is ambiguity in that the amount advanced cannot both be a present advance and be an amount due or accruing due from the mortgagor.

Section 4(b) sets out what is to be contained in the affidavit of *bona fides* as follows: "the affidavit of the mortgagee that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that the mortgage was executed in good faith and for the express purpose of securing the payment of *money justly due or accruing due* and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him or in cases falling within section 5, the affidavit therein prescribed."

My conclusion is that there is nothing in the affidavits of *bona fides* attached to the chattel mortgages which would warrant me in holding that the chattel mortgages were void as against purchasers for value. In two cases a present advance was made and the amount advanced was due or accruing due. In the other case, instead of taking payment for the Chevrolet car on which the sum of \$1,900 was due to the plaintiff and returning a cheque for the like amount to the plaintiff, the mortgage was taken on nine cars to secure the payment of the debt due or accruing due. The words "is a present advance being made by the Mortgagee to the Mortgagor" are not the words required by the statute but I cannot see that any am-

biguity is created by their presence in the affidavit, while, on the other hand, without these words the affidavit complies fully with the statute.

Under the authorities the plaintiff was entitled to possession of the cars in question. The defendant, having sold the cars with full knowledge of the plaintiff's contention, is liable for conversion and the plaintiff is entitled to recover the value of the cars sold.

The Chevrolet coach was sold for \$1,195, the Ford truck for \$1,490, and Dodge sedan for \$750. The cost of selling and repairing the cars for sale amounted to \$200. The plaintiff is therefore entitled to judgment against the defendant for \$3,235, together with interest from the date of the issue of the writ.

At the trial some discussion took place as to whether the the plaintiff might not accept \$2,350, being the amount advanced on the chattel mortgage, in satisfaction of its claim. Whatever it may wish to do, I can see no sound basis for giving judgment for less than the amount realized for the cars less the cost of repairs and selling.

The plaintiff will have the costs of the action.

*Judgment for plaintiff.*

*Solicitor for the plaintiff: Hyliard G. Chappell, Toronto.*

*Solicitors for the defendant: Parkinson, Gardiner, Willis & Roberts, Toronto.*



## [COURT OF APPEAL.]

## Regina v. Lee.

*Criminal Law—Murder and Manslaughter—To What Extent Trial Judge Required to Charge Jury, in Trial for Murder, as to Manslaughter—No Evidence to Justify Verdict of Manslaughter.*

Although it is the law that if there is any evidence, no matter how slight, that could entitle the jury to find a verdict of manslaughter instead of murder, that issue must be put to the jury, whether or not it has been relied on by counsel at the trial, yet it does not follow that where the trial judge does not consider that there is any such evidence, and the defence does not at any stage of the trial suggest that there is, the judge must elaborate the subject, so long as he leaves the issue to the jury and does not withdraw it from them. *Rex v. Krawchuk* (1941), 75 C.C.C. 219 at 221, quoted and applied.

*Evidence—Confessions—Admissibility—Burden on Crown to Establish Voluntary Character of Statement—Extent of Burden.*

The burden on the Crown, in seeking to adduce in evidence a statement made by the accused, is to prove affirmatively to the satisfaction of the trial judge that the statement was voluntary within the authorities. The only sense in which the question of doubt can arise is that if the trial judge is in doubt about the voluntary character of the statement it has clearly not been proved to his satisfaction. If it appears clear from a trial judge's judgment in admitting a statement that he is satisfied that the statement is voluntary within the rules laid down in *Boudreau v. The King*, [1949] S.C.R. 262, and he does not suggest that he is in any doubt on the matter, a new trial will not be ordered merely because he has stated, earlier in that judgment, that the burden on the Crown is not to prove the voluntary character of the statement beyond a reasonable doubt, but only to establish it by a preponderance of evidence.

AN APPEAL by the accused from his conviction for murder.

8th and 9th December 1952. The appeal was heard by PICKUP C.J.O. and HOPE, HOGG, J. K. MACKAY and F. G. MACKAY JJ.A.

*C. L. Dubin, Q.C. (J. L. Agro and C. M. Kennedy, with him),* for the accused, appellant: 1. There was both misdirection and non-direction on the issue of manslaughter. There was evidence which, if accepted by the jury in the manner most favourable to the accused, would show that he was incapable, by reason of the consumption of drugs, of forming the intent necessary to constitute the crime of murder. This required a charge to the jury similar to what would have been given in case of intoxication: Archbold's Criminal Pleading, Evidence and Practice, 32nd ed. 1949, p. 19. Where there is evidence of intoxication the jury must be told that the accused cannot be convicted of murder unless they are satisfied that he was capable of forming the necessary intent: *MacAskill v. The King*, [1931] S.C.R. 330, 55 C.C.C. 81, [1931] 3 D.L.R. 166; *Director of Public*



*Prosecutions v. Beard*, [1920] A.C. 479, 14 Cr. App. R. 159. Here the evidence was not related to this defence at all, and this is fatal: *Latour v. The King*, [1951] S.C.R. 19, 98 C.C.C. 258, 11 C.R. 1, [1951] 1 D.L.R. 834; *Rex v. Krawchuk*, 75 C.C.C. 219, [1941] 2 D.L.R. 353.

The cases make it abundantly clear that where there is some evidence, even if it is slight, on which the jury might find manslaughter, it must be fully and fairly put before them, even if the defence is not raised by the accused or his counsel at the trial: *Kwaku Mensah v. The King*, [1946] A.C. 83 at 91, 2 C.R. 113, [1946] 2 W.W.R. 455; *Rex v. Hopper*, [1915] 2 K.B. 431, 11 Cr. App. R. 136 at 141; *Rex v. Fosbreay* (1950), 98 C.C.C. 18 at 22, 10 C.R. 392; *Rex v. Wied*, [1949] 1 W.W.R. 626, 95 C.C.C. 108, 7 C.R. 453, [1950] 1 D.L.R. 143; *Rex v. Roberts* (1942), 28 Cr. App. R. 102; *Mancini v. Director of Public Prosecutions*, [1942] A.C. 1, 28 Cr. App. R. 65, [1941] 3 All E.R. 272; *Rex v. Illerbrun*, [1939] 3 W.W.R. 546, 73 C.C.C. 77 at 79, [1940] 1 D.L.R. 145; *Regina v. Hladiy*, [1952] O.R. 879.

The trial judge left it to the jury that on this issue (of manslaughter) the Crown was aided by the presumption that a man intends the natural consequences of his acts. This is gross misdirection where the issue is the accused's capacity to form an intent: *Rex v. Malanik* (1951), 1 W.W.R. (N.S.) 561, 100 C.C.C. 28, 11 C.R. 443; *Rex v. Hrynyk*, 56 Man. R. 380, 93 C.C.C. 100 at 105, 7 C.R. 141, [1949] 1 W.W.R. 129, [1949] 2 D.L.R. 394.

The trial judge told the jury that if they were not satisfied beyond a reasonable doubt that murder had been proved, but were so satisfied that manslaughter had been proved, they had a *right* to convict of manslaughter only. They should have been told that in these circumstances it was their *duty* to convict of manslaughter only, and also that it was their duty to do so if they had a reasonable doubt as between murder and manslaughter: *Latour v. The King*, *supra*; *Rex v. Kovach*, 66 O.L.R. 398, 55 C.C.C. 40 at 42, [1931] 1 D.L.R. 977; *Rex v. Harms*, [1936] 2 W.W.R. 114, 66 C.C.C. 134 at 139, [1936] 3 D.L.R. 497.

2. The trial judge erred in admitting the accused's statement made to the police on 4th June. The first statement made by him was rejected by the trial judge as inadmissible. If a second statement may have been induced by the fact that a

prior statement has been made, and the first statement is rejected as inadmissible, the trial judge should not admit the second statement in evidence unless it appears that the accused clearly understood that the first statement could not be used as evidence against him, and that its effect was erased from his mind: *Rex v. McDonald*, [1948] 1 W.W.R. 657, 91 C.C.C. 30 at 40, 5 C.R. 375, [1948] 3 D.L.R. 129; *Regina v. Finkle* (1865), 15 U.C.C.P. 453. This point, although it was argued, was not dealt with by the Court in *Rex v. Harris*, [1946] O.R. 407, 86 C.C.C. 1, 1 C.R. 509, [1946] 3 D.L.R. 520.

The accused's physical condition when he made the second statement was such that the trial judge should have exercised his discretion by refusing to admit it, as was done in *Rex v. Washer*, [1948] O.W.N. 393 at 394, 93 C.C.C. 218.

The trial judge misdirected himself as to the onus on the Crown in connection with a statement. The onus here must be the same as the general onus on the Crown, to prove the voluntary nature of the statement beyond a reasonable doubt, not merely, as said by the trial judge, by a preponderance of evidence: *Regina v. Thompson*, [1893] 2 Q.B. 12; *Ibrahim v. The King*, [1914] A.C. 599 at 610, followed in many Canadian cases, particularly *Boudreau v. The King*, [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81, and *Mentenko v. The King* (1951), 101 C.C.C. 312 at 319, 12 C.R. 228.

Even if this Court is of the opinion that the statement was clearly admissible, the accused has been denied a substantive right to have its admissibility determined by the trial judge on proper grounds: *Rex v. Byers*, 57 B.C.R. 336, 77 C.C.C. 164, [1942] 1 W.W.R. 587, [1942] 2 D.L.R. 104. The trial judge must have had some doubts, or the distinction as to onus would not have occurred to him.

For a case in which the accused's physical condition was considered in connection with the admission of a statement, I refer to *Rex v. Myles*, 56 N.S.R. 18, 40 C.C.C. 84, [1923] 2 D.L.R. 880.

3. The trial judge told the jury that if they found that any witness had flatly contradicted himself in an important particular they should disregard his evidence. The accused was the only witness who "flatly contradicted" himself, and the effect of this direction was to invite the jury not to pay any attention

to the evidence of the accused. This should not be said even where there are two conflicting statements on oath, and the witness is therefore clearly a perjurer: *Rex v. Kadeshevitz*, [1934] O.R. 213, 61 C.C.C. 193; *Latour v. The King*, *supra*.

4. The issue of insanity should have been left to the jury. It has been held that evidence that a person has attempted to commit suicide (the Crown's theory in this case) is some evidence of insanity. It has also been said that medical evidence is not necessary to prove insanity, and that it can be found on a consideration of all the circumstances of the case. Here, even if the story told by the accused was not true, it appears clear that he believed it to be true, and if he did, that fact, coupled with many other circumstances, tended to establish that he was insane, and this issue should have been put to the jury: Meredith, *Insanity as a Criminal Defence*, 1931, p. 86; *Regina v. Dart* (1878), 14 Cox C.C. 143.

5. The trial judge did not present the accused's defence fully and fairly to the jury. There were many circumstances apart from the accused's evidence that supported his version of what happened, but the trial judge did not mention any of them in this connection. He also did not discuss, as part of the defence the complete absence of any evidence of motive, which is important in a case based on circumstantial evidence: *Markadonis v. The King*, [1935] S.C.R. 657 at 665, 64 C.C.C. 41, [1935] 3 D.L.R. 424; Wills on Circumstantial Evidence, 7th ed. 1937, p. 273.

6. The trial was not fair because the jury were not kept free from any possible contact with outsiders, in violation of s. 945 of The Criminal Code, R.S.C. 1927, c. 36. The jury went to a theatre in Hamilton during the trial, and the Crown's material does not satisfy the onus under *Rex v. Ryan* (1951), 4 W.W.R. (N.S.) 32, 101 C.C.C. 101, 13 C.R. 363.

W. B. Common, Q.C., for the Attorney-General, respondent:  
1. There was ample direction on the issue of manslaughter. What the trial judge said about not being convinced that s. 951(2) had anything to do with the case was merely an expression of his opinion; he made it clear to the jury at the same time, as he had already done, that all questions of fact were for them. The charge must be read as a whole. [PICKUP C.J.O.: If the trial judge says that in his opinion there is no



evidence of manslaughter, is that not an instruction as to the law?] Not in the way he put it here. [J. K. MACKAY J.A.: If there was no evidence of manslaughter, why did the trial judge charge the jury about it at all?] Possibly defence counsel, in addressing the jury, said something about the effect of drugs. It is significant that no objection was taken to the trial judge's charge in this respect.

In any event, I submit alternatively that there was no evidence in this case that would have warranted the jury in returning a verdict of manslaughter. There is no proper medical evidence in the record to show the effect of the drugs on this man; the doctor (if any) who prescribed the barbiturates was not called. There is also no real evidence that the accused ever took any pills at the relevant time, and, if it is to be taken that he did take them, there is a complete absence of evidence as to the quantity taken. Nowhere in the accused's evidence is there any reference to the taking of pills, and the other evidence is unsatisfactory.

*Latour v. The King, supra*, was a very different case from this one, and in all the other cases cited on this point there was evidence of drinking or provocation. Nowhere is it laid down that manslaughter must always be left to the jury on a trial for murder.

*Rex v. Malanik, supra*, does not support the proposition that where the issue is intent there is no presumption that a man intends the natural consequences of his acts, unless there is some positive evidence to show that the accused lacked capacity, in which case alone does the presumption cease to apply. This is supported by what Fauteux J. said about the presumption in the *Latour* case. The presumption does exist, no matter what the defence is, but it may be rebutted if the accused goes far enough to raise a reasonable doubt as to his capacity.

The word "right" in connection with a verdict of manslaughter could not have misled the jury. They did not ask for any further instruction in this matter. [HOGG J.A.: The trial judge probably used that word because of the word "may" in s. 951(2).]

2. Even if a first statement is inadmissible, this fact does not affect the admissibility of a second statement, even if it is made without removal of the effect of the first: *Rex v. Johnston*,



[1948] O.R. 290, 91 C.C.C. 59, 5 C.R. 320, [1948] 3 D.L.R. 781, and the cases cited in the 1951 Supplement to Tremear's Annotated Criminal Code, p. 157, particularly *Boudreau v. The King*, *supra*, where, although there were several statements, this point was not mentioned by any judge in any Court. The decision in *Rex v. McDonald*, *supra*, should not be followed; it is not logical to expect a police officer to take the responsibility of saying that a statement will not be admitted at the trial.

The trial judge's remark about the preponderance of evidence was incidental. His actual conclusion was that the statement was voluntary within the rules laid down in the *Boudreau* case, and that was the basis of his ruling that it was admissible. He gave no indication that he had any doubt as to the voluntary nature of the statement, and this Court can come to an independent conclusion that the statement was voluntary, as the Supreme Court of Canada did in the *Boudreau* case.

3. This direction appears among the trial judge's general directions as to the weighing of evidence. He had not in mind, and the jury could not have inferred, a reference to the accused. He must have meant to refer only to sworn evidence at the trial, and to contradictions in that evidence. In dealing specifically with the evidence he outlined the whole of the accused's story, and did not point out any contradiction between it and his statement to the police. He twice told the jury in terms that they "must consider" the accused's evidence.

4. No trial judge has a right to put the issue of insanity to the jury unless it is raised, or there is some evidence to indicate disease of the mind within s. 19. The mere fact that he thinks the accused's story is an improbable one cannot justify him in raising this issue.

5. The defence was fully and fairly put before the jury. The trial judge is not required to deal in his charge with every matter. He did deal with motive.

6. The material filed by me clearly indicates that there was no communication between the jury and the public. [THE COURT: You need not argue that point further.]

In conclusion, I rely on s. 1014(2) of The Criminal Code, and submit that no jury, properly instructed, could have brought in any other verdict. Had the defence been different, slips in the trial judge's charge might possibly have had serious con-

sequences, but in view of the wholly incredible story told by the accused in his evidence the jury could not have come to any other conclusion. The appeal should therefore be dismissed even if the Court is of the opinion that there was error in the trial judge's charge.

*C. L. Dubin, Q.C.*, in reply: The fact that manslaughter was not stressed at the trial did not relieve the trial judge of the duty, if there was any evidence, to put the issue before the jury as fully and fairly as if it had been the only defence raised. Here the charge was completely inadequate; in addition to the trial judge telling the jury as a matter of law that s. 951(2) had nothing to do with the case, he made two specific errors: (1) the law as to intoxication was not put before the jury at all; (2) he told them that the only evidence was that of the consumption of barbiturates, with the medical evidence as to their effect, whereas the law is that evidence of liquor must be considered in the light of all the circumstances of the case: *Rex v. Taylor*, [1947] O.R. 332 at 360, 88 C.C.C. 281, 3 C.R. 449, [1947] 3 D.L.R. 91, in the dissenting judgment of Roach J.A., which was expressly approved by the Supreme Court, *sub nom. Taylor v. The King*, [1947] S.C.R. 462, 89 C.C.C. 209, 3 C.R. 475, [1948] 1 D.L.R. 545.

Once the issue is raised by some evidence the onus is on the Crown to negative intoxication; there is no onus at all on the accused in this respect. The law must be the same in respect of the use of drugs. Had the trial judge thought there was no evidence at all he would not have said anything about manslaughter to the jury.

As to the misdirection in telling the jury they had a "right" to return a verdict of manslaughter, I refer to *Rex v. Costello*, [1932] O.R. 213 at 223, 58 C.C.C. 3, [1932] 2 D.L.R. 410; *Rex v. Arnold*, [1947] O.R. 147 at 154, 87 C.C.C. 236, 3 C.R. 31, [1947] 2 D.L.R. 438.

The distance to which the Courts have gone in this respect is shown in *Rex v. Hughes*, 57 B.C.R. 521, 78 C.C.C. 1, [1942] 3 W.W.R. 1, [1942] 3 D.L.R. 391, affirmed [1942] S.C.R. 517, 78 C.C.C. 257 at 265, [1943] 1 D.L.R. 1.

*Boudreau v. The King*, *supra*, did not deal with onus. What the trial judge said in effect was that he was satisfied by a preponderance of evidence that this statement was voluntary

within the rules laid down in the *Boudreau* case. The mere fact that he made this remark shows that he had some doubt.

As to the jury's trip to the theatre, I refer also to *Rex v. Nash* (1948), 24 M.P.R. 11, 94 C.C.C. 288, 8 C.R. 378.

To apply s. 1014(2) the Court must be satisfied that the jury must necessarily have come to the same conclusion had no mistake been made. It is very hard to find in this charge anything favourable to the accused, and yet the jury deliberated for more than four hours. They might easily have reached the opposite conclusion if the charge had been properly favourable to the defence: *Latour v. The King*, *supra*, at p. 270 (98 C.C.C.); *Brooks v. The King*, [1927] S.C.R. 633, 48 C.C.C. 333, [1928] 1 D.L.R. 268; *Schmidt v. The King*, [1945] S.C.R. 438, 83 C.C.C. 207, [1945] 2 D.L.R. 598; *Minguy v. The King* (1920), 61 S.C.R. 263, 34 C.C.C. 324, 58 D.L.R. 77.

*Cur. adv. vult.*

19th December 1952. The judgment of the Court was delivered by

PICKUP C.J.O.:—This is an appeal by the accused from his conviction on a charge of murdering one Mary Rosenblatt. The accused was tried by a jury before Mr. Justice Spence at Hamilton, and convicted on the 4th October 1952.

The evidence shows that Mary Rosenblatt was a married woman, with children, and apparently deeply devoted to her home. In addition to her household duties she added to the family finances by part-time waitress work at ceremonial occasions in synagogues, or like places, and sometimes working late hours at the homes of those interested in celebrations. On the 31st May 1952, which was a Saturday, Mary Rosenblatt had been engaged in such part-time waitress work at the synagogue in Westdale. She left that synagogue by taxi at about 4 o'clock in the afternoon, and was driven by a taxi-driver to the synagogue on Cannon Street west. Next door to this synagogue was the home of Mrs. Dennis with whom the accused resided. The taxi-driver last saw Mary Rosenblatt going down toward the door at the back of the synagogue. He did not see her enter the synagogue, or enter the house next door. Apart from the evidence of the accused himself nothing more is known as to what happened to Mary Rosenblatt until she was found



in the accused's car in the early hours of Monday morning, 2nd June. At that time one Davidson, who operates a motorcycle garage business on highway no. 8, a mile and a half west of Sheffield and approximately four miles from the outskirts of Galt, was attracted by the sounding of a horn, and, on investigating, found the accused man in the motor car with the motor running. The accused was leaning back against the door-post on the driver's side of the car and behind the steering-wheel. Mary Rosenblatt was dead beside him. The accused appears to have had two bullet wounds and the deceased woman had been shot to death. The police were called at the request of the accused, and he was removed to hospital. There was a rifle lying on the floor in the rear of the car. This was the accused's rifle.

Expert testimony was called by the Crown, testifying to the opinion that the bullet-wounds in the body of the accused were from that rifle, that the wounds in the body of the deceased woman were the result of similar bullets, and that the shots were fired from within the car, those which killed Mary Rosenblatt being from possibly two feet away, and those which entered the body of the accused being fired with the rifle practically at contact with the body of the accused.

The accused gave evidence on his own behalf and told what the learned trial judge has referred to as a remarkable story. He told of Mary Rosenblatt having telephoned him during the afternoon of the Saturday and of her going over to the house where he lived, which adjoins the synagogue. It was about four o'clock in the afternoon when she arrived at that house. He says intimate relations took place between him and Mary Rosenblatt. He also says that two men came in early in the evening, one of them with a revolver, and that from then on he and Mary Rosenblatt were under the control of these two men. Several persons came in for one purpose or another, but the errand upon which they came was promptly attended to, so that they left without knowing of the presence of Mary Rosenblatt or of these two men. During the evening these two men, according to the accused's story, tied up the wrists and knees of Mary Rosenblatt and the accused, at their direction, tied her ankles. On one occasion during the evening the accused took his car to a service-station and got oil, coming back to the house, the two men



and Mary Rosenblatt staying in the house. About ten o'clock, by the direction of these two men, the four left the house and from then on, during Saturday night, all day Sunday and into the early hours of Monday morning, the accused was driving around the country. At times one of the men was with them, and at other times both of the men were in another car following. At times the accused and Mary Rosenblatt appear to have been alone and free from surveillance from either of these men. At one time the accused talked to a police officer. At another time Mary Rosenblatt telephoned to her husband, but according to the story of the accused these two men kept turning up from time to time and kept giving orders as to what they were to do. There was a stop for about two hours when some pictures were taken. At some time during the afternoon of the Sunday Mary Rosenblatt wrote a note, which she put in the accused's pocket. This note stated, in effect, that she and the accused were in love with each other, and that she had gone with the accused on this occasion of her own free will. The accused explained the reason for this note as being to prevent it being thought that he had abducted Mary Rosenblatt. Finally, according to the story of the accused, he and Mary Rosenblatt turned down a side road and while they were parked there these two men again appeared. He was told to get out of the car. As he got out of the car Mary Rosenblatt took the rifle from the floor and put it on the seat of the car. The accused and one of the men both made a grab for the rifle and it discharged in the scuffle. The tussle for the rifle continued, the accused receiving two blows on the head from the butt of the revolver. In the tussle the rifle was pushed into him and discharged. Mary Rosenblatt then received her two shots. The accused made a grab for the rifle, and then he received another shot. After this, the accused said, the man with the rifle dropped the rifle and ran.

Such was the story of the accused as given at the trial.

I should also mention that a witness, Tom Dennis, testified to the accused having telephoned to him during the evening of Saturday and asked him if he had an unregistered revolver. This caused the witness Dennis to go over to the house where the accused was, to find out why the accused wanted this revolver. The accused then told him to forget it. On this call the witness did not see Mary Rosenblatt, but noticed a woman's

bag, and the accused's explanation of that was that it was the bag of some woman in the synagogue. This handbag was later identified as the handbag of the deceased woman.

The theory of the Crown was that what occurred on Monday morning, 2nd June, was murder and attempted suicide, either as the result of a suicide pact or as a result of the accused's intentions toward Mary Rosenblatt being thwarted. The accused's defence at the trial would appear to have been that he did not do the shooting at all, but that the shooting was done by these two men, or one of them. It was not suggested at the trial or on the appeal that there was anything accidental about the shooting of Mary Rosenblatt, and any such suggestion would, on the evidence, be insupportable. In support of the accused's story his counsel called a witness who testified to having seen a car pull up outside "Welcome Inn" about midnight of Sunday. Two men were in the car. The car pulled in at a terrific rate of speed and a remark made by one of the men indicated that they were going to get some fellow and beat him up. Welcome Inn is on highway no. 8 at what they call the corner of East Main and Dundas, just south of Galt.

The first issue which the jury had to determine in this case, and apparently the only defence relied upon at the trial, was whether or not they were satisfied beyond reasonable doubt that the accused was the one who shot Mary Rosenblatt, and not one or other of the two men referred to in the evidence of the accused. Was there any misdirection or non-direction by the learned trial judge on this issue? I think not.

Objection was taken by counsel for the appellant to the fact that in his charge to the jury the learned trial judge, in discussing generally the approach to a consideration of the evidence, after telling the jury that they could accept in whole or in part the evidence of any one witness, said that if, in their opinion, any witness had contradicted himself flatly upon an important element, then they should look at the evidence of that witness with the utmost suspicion, and would do well to arrive at their verdict without regard to his evidence. Counsel suggests that this statement could have reference only to the evidence of the accused himself, because of conflict between certain statements made by the accused to the police before the trial and his evidence at the trial. It is, of course, not what the judge intended

by the remark that is the important factor. It is what the jury understood from it. This statement to the jury might have been fatal if it had stood by itself, but the learned trial judge, later in his charge, made it perfectly plain that the jury were not to disregard the evidence of the accused. He did not go over the evidence given by the accused. The accused had been the last witness to give evidence before the addresses of counsel. The learned trial judge referred to the evidence of the accused as having been just heard in detail by the jury and being fresh in their minds. He told the jury that they had the benefit of the accused's evidence; that they could and must consider it in coming to their conclusions, and that they must consider his evidence as given and determine how it affected the Crown's evidence, which he had reviewed in some detail. In view of the later statements made by the learned trial judge and just referred to, I do not think the jury could have taken the earlier statement of the learned trial judge, in discussing in a general way the weighing of evidence, as meaning they would do well to disregard the evidence of the accused. The evidence of the accused was in reality the only defence raised at the trial, and, if true, was a complete defence.

No objection was taken by counsel at the trial to the charge of the learned trial judge. Counsel for the accused on this appeal argues, however, that the jury might have understood the trial judge to mean that while they must consider the evidence of the accused and its effect, they were to consider it in the light of his statement that they would do well to disregard it. I do not think the judge's charge is capable of that meaning. I would not give effect to this objection by counsel for the appellant.

Another objection taken to the charge of the learned trial judge, which relates to this general issue, was that the learned trial judge did not point out to the jury details in the evidence which counsel for the appellant contends should have been pointed out to the jury as being favourable to the accused. The learned trial judge plainly put to the jury the issue as to whether the Crown had satisfied them beyond a reasonable doubt that the accused did the shooting. He particularly referred to the evidence of the witness who had seen two men who were after a third person whom they were determined to "get". I would not give effect to this objection.



Another objection raised by counsel for the appellant was that there was misdirection and non-direction on the part of the learned trial judge in failing to put the issue of manslaughter fully to the jury, and in failing to relate the evidence to that issue. This was based upon the suggestion that by reason of consumption of drugs the accused may have been incapable of forming the intent necessary to constitute the crime of murder, counsel for the appellant contending that on the facts of this case the learned trial judge should have charged the jury as a jury should be charged where the question of drunkenness is involved.

The learned trial judge did not consider that there was any evidence which could entitle the jury to reduce the offence of the accused, if he fired the shots, from the offence of murder to that of manslaughter. He read to the jury subs. 2 of s. 951 of The Criminal Code, R.S.C. 1927, c. 36, and told them that if they were of opinion that the Crown had failed to prove beyond a reasonable doubt that the accused was guilty of murder, and were of the opinion that the Crown had proved beyond a reasonable doubt that the accused was guilty of manslaughter, they had the right to bring in a verdict of not guilty of murder but guilty of manslaughter.

After discussing the intent necessary to constitute murder, he told the jury that the only evidence which might be considered, in his opinion, in rebuttal of the presumption that a person intends the natural consequences of his act, was the evidence relating to consumption by the accused of what might have been considered to be large quantities of barbiturates, and the vague testimony of Dr. Seaton and Dr. Smith as to the possible effect in irritability, excitability and nervousness. There was no suggestion in the evidence of the accused that on any of the days in question he was in any way under the influence of drugs. Although the learned trial judge appears to have been of the opinion that the evidence relating to drugs had not the slightest relevance to the case, he did ask the jury the direct question whether the evidence as to the consumption of drugs and the vague testimony of Dr. Seaton and Dr. Smith as to the possible effect in irritability, excitability and nervousness, without the assistance of even an allegation by the accused, who gave evidence, even raised a reasonable doubt that the accused was



capable of and did form the intent necessary to constitute murder. He had already told the jury what intent was necessary in law to constitute that offence. He was also careful, in putting this question to the jury, to confine it to the event of their having found beyond a reasonable doubt that the accused did fire the shots.

The evidence as to the use of barbiturates consisted mainly in a telephone conversation adduced by the Crown in evidence. This telephone conversation took place on the Saturday evening and was a conversation between the accused and his landlady, Mrs. Dennis, who, at the moment, was in Cayuga. She asked the accused what was the matter with him and if he had been taking too many pills, and, the call being after midnight on the Saturday evening, she asked him why he was calling her at that time of night. His answer was: "Pills, lots of pills! Maybe after to-night I won't need any more." She then asked him if he was crazy, to which he replied there was "monkey business". The accused also refers to this telephone call in his evidence and explains it by saying, and I quote his evidence:

"Q. It was said that during that conversation you said you are taking lots of pills. Maybe you wouldn't need any more, is that right? A. That is correct.

"Q. You did say that? A. I said that.

"Q. Why? A. Because Mrs. Dennis had asked me—She was talking. She was worried and she said something over the phone. She asked me if I was taking too many pills, and I said that so maybe she might know that there was some trouble going on at the house."

In addition to this evidence there was found in the car early on Monday morning a partly-filled box of pills which contained pheno-barbital and codeine, and there was evidence that prior to the Saturday in question the accused had, to some extent, been taking pills, but there was no evidence as to amount or that he was a drug addict. In fact there is no evidence whatever, apart from the statement above referred to, that the accused actually had taken any drugs on the Saturday in question or between that time and early Monday morning, when the tragedy occurred.

I am of the opinion that there was no evidence in this case which could entitle a jury to come to the conclusion that the

accused at the time of this tragedy was in any way affected by barbiturates or any other drug so as to be rendered incapable of having the intent necessary to constitute the crime of murder, if he fired the shots. I do not think the learned trial judge need have charged on this issue of manslaughter at all, and in saying what he did I do not think it can be said that there was non-direction or misdirection.

Counsel for the appellant argues that if there was any evidence, no matter how slight, which could entitle the jury to find a verdict of manslaughter instead of murder, that issue must be put to the jury, whether or not it was relied on by counsel at the trial. That is, no doubt, the law, but it does not follow that where, as in this case, the trial judge does not consider that there is any such evidence and the defence does not at any stage of the trial suggest that there is, the trial judge need elaborate the subject, so long as he leaves the issue to the jury and does not withdraw the issue from them. The learned trial judge did leave this issue to the jury in this case. He told them quite plainly what the law was as to the intent necessary to constitute murder; that on a charge of murder they had the right to bring in a verdict of manslaughter and, after referring to the evidence as to barbiturates and the evidence of the doctors, without going over that evidence, he put to the jury the question whether, having that evidence in mind, they were satisfied, beyond reasonable doubt, that the accused was capable of having the intent necessary to constitute murder. On the facts of this case I think the charge of the learned trial judge was sufficient on this point, even if the trial judge was wrong and I am wrong in thinking that on the whole evidence there was nothing to entitle the jury to return the lesser verdict.

I am confirmed in this view by what was said by Crocket J. in *Rex v. Krawchuk*, 75 C.C.C. 219 at 221, [1941] 2 D.L.R. 353, where he said: "I can understand how any trial Judge, whose attention had not been particularly directed to such a piece of evidence, contained in such an incoherent written statement, and who upon a careful consideration of the rest of the testimony was himself convinced that the evidence fell short of proving anything in the nature of what the law recognizes as sufficient to reduce a charge of murder to manslaughter on the ground that the offender had acted in the heat of passion caused

by sudden provocation, could not well be expected to elaborate the subject of provocation to any greater extent than was done in this case."

Another objection taken by counsel for the appellant should be mentioned in connection with the question of manslaughter. Counsel contended that the learned trial judge erred in telling the jury that they had the right to bring in a verdict of not guilty of murder but guilty of manslaughter, if they were of the opinion that the Crown had failed to prove beyond a reasonable doubt that the accused was guilty of murder but were of the opinion that the Crown had proved beyond a reasonable doubt that the accused was guilty of manslaughter. This statement made by the learned trial judge was quite correct. In the context in which this statement was made it would not have been correct for the trial judge to tell the jury that it was their duty to bring in a verdict of manslaughter. They could not bring in a verdict of either murder or manslaughter until they had determined whether or not the accused had fired the shots which killed Mary Rosenblatt.

The real objection by counsel for the appellant in this connection was that in no place in his charge did the learned trial judge tell the jury that if, in their opinion, the accused had fired the shots but was not capable of forming the intent necessary to constitute murder, it was their *duty* and not merely their *right* to bring in the lesser verdict. If, on the evidence, it was a proper case in which the jury might bring in the lesser verdict, the direction should have been that it was their *duty* and not merely their *right* to bring in the lesser verdict. On the evidence in this case I do not think it was necessary for the learned trial judge so to direct the jury.

Another objection made on behalf of the appellant was that the learned trial judge erred in admitting the statement made by the accused to the police on 4th June.

Immediately after the accused and the deceased woman were found the accused asked the garage operator who found them to call the "cops", and the accused was then taken to the hospital. On the way to the hospital, or at the hospital, he made a statement which was not admitted in evidence by the learned trial judge. I would have thought the statement then made was a voluntary statement and admissible as such, but the learned



trial judge, in exercising his discretion, probably because of the condition of the accused at the time, decided not to admit that statement. Counsel for the accused argues that the subsequent statement taken on 4th June was inadmissible because the accused may still have been affected by the statement given by him prior to that, which he says was untrue, and which he felt should be corrected in some respects. Counsel argues that, notwithstanding that the accused was duly warned before making the statement on 4th June, he should have been told that the previous statement made by him could not be used in evidence. On the facts of this case this contention is not maintainable.

Counsel for the accused also argued that the learned trial judge misdirected himself as to the law in admitting this statement, because he said in his judgment on the *voir dire* that the onus upon the Crown in presenting such a statement was not an onus beyond reasonable doubt, but one upon the preponderance of evidence. The correct principle, as I understand it, is that the burden upon the Crown is to prove affirmatively to the satisfaction of the trial judge that the statement sought to be admitted in evidence was a voluntary statement. The only sense in which the question of doubt properly comes into it, in my opinion, is that the voluntary character of the statement must be proved to the satisfaction of the trial judge, and if the trial judge is in doubt about it, it has not been proved to his satisfaction. In any event, it appears plain from the trial judge's judgment on the *voir dire* that he proceeded upon the principles laid down in *Boudreau v. The King*, [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81. He said that he considered the statements made by the accused on this occasion were perfectly voluntary and technically admissible within the rules in the *Boudreau* case. The trial judge does not, in his judgment on the *voir dire*, suggest that he was in any doubt about the admission of this statement. I do not think that the learned trial judge erred in admitting this statement in evidence.

Another argument raised by counsel for the accused was that the learned trial judge should have charged the jury on the question of insanity. The learned trial judge did not put this issue to the jury, and, in my opinion, he was quite correct in not doing so. There was no evidence in this case which would



have justified the jury, if they came to the conclusion that the accused had fired the fatal shots, in bringing in a verdict of not guilty on the ground of insanity. No question of insanity was raised at the trial, and it would, I think, have been seriously prejudicial to the defence raised by the accused if the learned trial judge had in any way suggested that the accused was labouring under delusions of any kind in the story which he had told about the two men who, at gun-point or otherwise by force, were compelling him and Mary Rosenblatt to do the things which they did during the period in question. The accused was entitled to have his story of what occurred considered by the jury without any suggestion from the trial judge that he was insane or suffering from delusions, when there was no evidence at the trial suggesting insanity within the meaning of s. 19 of The Criminal Code.

One other objection taken by counsel for the accused was that the jury were allowed to go to the theatre during the course of the trial, and that this fact justified the granting of a new trial. Upon this question the Court permitted, without objection by counsel for the accused, affidavits to be filed showing the circumstances surrounding the jury going to the theatre during the course of the trial, and from such affidavits it seems to be quite plain that proper provision was made for preventing the jury from holding communication with anyone on the subject of the trial. I think this ground of appeal also fails.

The result is that on all grounds the appeal fails and should be dismissed.

*Appeal dismissed.*

*Solicitors for the accused, appellant: Agro & Kennedy,  
Hamilton.*

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[JUDSON J.]

[COURT OF APPEAL.]

**MacKinder and MacKinder v. The City of London et al.**

*Negligence — Dangerous Premises — Duty of Occupant — Covering over Excavation in Park — Covering in Rotted Condition — Person lawfully in Park falling through Covering into Excavation.*

*Public Utilities — Limitation of Actions — Action for "anything done in pursuance of this Act" — Special Position of London Public Utilities Commission in respect of Parks — The London Waterworks Act, 1873 (Ont.), c. 102, s. 31 — The Public Utilities Act, R.S.O. 1950, c. 320, s. 32.*

The female plaintiff, while lawfully in a public park owned by the City of London and managed by the London Public Utilities Commission, fell through the covering over an excavation that had been made by the Commission to contain one of its meters. The covering had become rotted, and it was found as a fact that employees of the Commission, whose duty it was to report such a condition, had known of it.

*Held*, the City was liable. It was the occupier of the premises through the Commission as its statutory agent. *Humphreys v. The City of London*, [1935] O.R. 91, 295, applied. Through that agent it created in the park a hidden excavation that was at all times a potential danger, and that became an actual danger when the covering became rotted to such an extent that it no longer prevented persons from falling into the excavation. The City was therefore under a duty, as occupant, to protect persons lawfully using the park from this hidden danger, since it had knowledge of it through the Commission's employees. It owed this duty to the female plaintiff even if she was only a licensee, and *a fortiori* if she was an invitee. The action was not based on anything done, or anything that ought to have been done, under The London Waterworks Act, 1873, or The Public Utilities Act, and was consequently not barred in six months under s. 31 of the former Act or s. 32 of the latter. *Wilson v. The Mayor and Corporation of Halifax* (1868), L.R. 3 Exch. 114, distinguished.

AN APPEAL by the City of London from the judgment of Judson J., *infra*, and a cross-appeal by the plaintiffs.

17th and 18th October 1951. The action was tried by JUDSON J. without a jury at London.

*E. J. R. Wright*, for the plaintiffs.

*G. L. Mitchell, K.C.*, for the defendants.

18th October 1951. JUDSON J. (orally):—The plaintiff Beatrice MacKinder is a member of the Lorne Avenue Home and School Association, and this association held a picnic in Springbank Park on the 27th June 1950, and this plaintiff attended that picnic.

Springbank Park is a park owned by the City of London, some distance outside the city limits, and by The City of London Act, 1912 (Ont.), c. 107, the control and management of that

park is in the Public Utilities Commission of the City of London, also a defendant in the action.

The picnic assembled about 3 o'clock in the afternoon. The plaintiff was sitting on a picnic bench facing east, and immediately in front of her, flush with the ground, were what have been described as boards. These boards were about a foot in front of the bench and to the east of it. Mrs. MacKinder got up to take her child from the play-pen, to the east of the bench. She picked up the child and returned to the bench with the child in her arms, and in so doing she crossed the boards.

In actual fact, two of those boards formed the lid of a meter-box and that lid was movable. When Mrs. MacKinder stepped on to the lid of the meter-box, travelling from east to west, the lid tilted and she fell into the meter-box. The child was unhurt, but Mrs. MacKinder suffered injuries.

The meter-box was installed in the fall of 1946 by the Public Utilities Commission. Its purpose is to meter the water that is supplied by the Commission to the Village of Byron. Its construction was described in some detail. Its dimensions are 3 feet by 5 feet 6 inches and it is 4 feet 6 inches deep. It is lined with lumber and covered by planks. Some of these are nailed to the surface, but there are two planks that form the lid and these are secured by cleats.

There is an exhibit filed that shows the construction of this lid. I do not think this exhibit is the plan of the particular box in question in this action, but it is a similar one. The only difference is that this exhibit shows a lid with three planks, and I have said that the lid of the box in question in this action had two planks. The floor of the box is not lined. There is the usual water on the floor of the box—water that comes through by seepage and condensation.

The meter was read every Friday by employees of the Public Utilities Commission. It is their duty, when reading the meter, to inspect the condition of the box. The last reading before the accident was on the 23rd June 1950, and the accident occurred on the 27th June 1950.

The first question to determine here is whether Mrs. MacKinder was an invitee or a licensee in this public park. Mr. Wright submits that I should find that she was an invitee because she was a member of an association that paid \$1 for



the privilege of holding a picnic in the park. He says that this constitutes a common economic or business interest between the occupier and the visitor and that this makes a visitor an invitee; and there does not seem to be much doubt that such a common economic or business interest between the occupier and the visitor is necessary in order to make a visitor an invitee.

I am quite unable to make Mrs. MacKinder an invitee as a result of her attendance at the picnic for which the association to which she belonged paid \$1 as a licence fee to the Public Utilities Commission. This licence fee is merely by way of regulation. It is a nominal sum. Springbank Park contains eleven picnic areas and if an association wants the exclusive use of an area, then it applies to the Commission for a permit and pays this \$1 licence fee.

In my opinion in this case the plaintiff entered the park as a member of the public to use a public playground, and the strong weight of authority is in favour of holding such a person to be a licensee. That authority is to be found in cases that were cited in argument: *Ellis v. Fulham Borough Council*, [1938] 1 K.B. 212, [1937] 3 All E.R. 454; *Richardson v. The City of Windsor*, [1942] O.R. 1, [1942] 1 D.L.R. 500, and *Sutton v. Bootle Corporation*, [1947] K.B. 359 at 362, [1947] 1 All E.R. 92.

It also seems settled with reasonable clearness that the duty of an occupier to a licensee is not to expose him to an unusual danger of which the occupant knows, or not to expose him to hidden known dangers. That duty does not extend to dangers of which the occupier ought to, but does not, know.

The question here is, Was this a hidden known danger? Perhaps before I go into that question I should say that there is no ground whatever for saying that Mrs. MacKinder was unobservant, or that she did not use reasonable care for her own safety. The planks were there in front of the park bench, and there was nothing about that that would give her any warning of danger.

As to the danger and whether it was known to the occupier, Mr. Wright submits that the meter-box in itself was a danger and a known danger. The evidence is that the meter-box, when constructed in 1946, was constructed according to ordinary

practice, that it was similar to many other meter-boxes in use, that it was constructed in a park for the purpose of bearing ordinary traffic, and that the lid of the box would bear such traffic in the park so long as the meter-box lid was in good repair. It is my opinion that the mere fact that the box existed or had been installed in this way did not constitute a danger.

That, however, does not end the matter by any means. There is a good deal of evidence as to the condition of the lid of this box. [His Lordship here reviewed the evidence, that which he accepted being to the effect that some of the wood in the lid was rotten and damp with age. He proceeded as follows:] The conclusion I draw is that these conditions were apparent, they were plain to be seen, they existed for Gauld and McCall [the two meter-readers] to see on the 23rd June, and they did see them but did nothing about the condition of the lid.

I therefore find that this lid was a hidden danger, known to two employees of the Public Utilities Commission whose duty it was to inspect the condition of the lid.

Now, as to the position of the Public Utilities Commission. This Commission occupies a peculiar position in the city of London with respect to parks because of special legislation. By The City of London Act, 1912, the whole management and control of public parks in the city of London is conferred upon the Commission. In 1912 the Commission was known as the Waterworks Commissioners of the City of London. It became the Public Utilities Commission in 1914, by c. 74, s. 7, of that year. There has been litigation which has decided the status of the Commission in operating the parks. The case is *Humphreys v. The City of London*, [1935] O.R. 91, [1935] 1 D.L.R. 300, affirmed with a variation [1935] O.R. 295, [1935] 3 D.L.R. 39, and that case holds that in operating the parks the Public Utilities Commission does so as the statutory agent of the City of London.

Section 10 of The City of London Act gives the Water Commissioners of the City of London the whole management and control of all public parks in the city of London and of Springbank Park, owned by the City, but situate in the township of Westminster. The Water Commissioners are to have, with respect to parks, all the powers that a board of park manage-

ment would have under the provisions of The Public Parks Act, now R.S.O. 1950, c. 314.

Therefore under this legislation the Public Utilities Commission acts as statutory agent of the municipality, with the powers of a board of park management under The Public Parks Act. A public park, of course, is not a public utility. It is not easy to decide who is the occupier of this park—whether it is the City of London operating through its statutory agent or whether it is the Public Utilities Commission alone. The legislation says nothing about exclusive possession. It deals with management and control. My view is that the City of London is occupier of the park through its agent, and that therefore the City of London is liable for the damage—for the injuries suffered by Mrs. MacKinder.

It is significant that possession is recognized by the existence of a by-law of the City of London that has been put in as ex. 2, providing for the regulation of parks, and the preamble to that by-law recognizes the management of the Commission under the statute of 1912. I understand that there is a similar by-law enacted by the Commission; that by-law has not been put in as an exhibit.

Suppose I am wrong in holding that the occupation is that of the City of London and suppose it is held that the occupation was that of the Public Utilities Commission. For the next moment or so I shall assume that the occupation is that of the Commission. Mr. Mitchell argues that this case is statute-barred under s. 31 of The London Waterworks Act, 1873 (Ont.), c. 102, and s. 32 of The Public Utilities Act, R.S.O. 1950, c. 320. Both these sections impose a six months' limitation on actions brought for anything done, under the first Act by the Waterworks Commissioners, and under the second Act by the Public Utilities Commission.

I am not giving effect to that argument, even if the occupation was that of the Commission. The Commission, as I have said, has a very peculiar position with reference to parks. It is really a board of park management under The Public Parks Act, and a public park is not a public utility. If it were necessary to go on to decide the point, I would hold that neither the limitation section in The London Waterworks Act of 1873 nor



that in The Public Utilities Act had any application to the facts of this case.

[His Lordship proceeded to review the conflicting evidence as to damages, assessing those of the plaintiff Beatrice Viola MacKinder at \$1,900 and those of the plaintiff John MacKinder at \$311.50, and directing judgment for those amounts with costs as against the City of London. The action as against the Public Utilities Commission was dismissed without costs.]

*Judgment accordingly.*

21st November 1952. The appeal was heard by PICKUP C.J.O. and HOPE and AYLESWORTH JJ.A.

*G. T. Walsh, Q.C.* (*G. T. Walsh, Jr.*, with him), for the defendant the City of London, appellant, and for the defendant the Public Utilities Commission, respondent in the cross-appeal: The trial judge was right in finding that the female plaintiff was only a licensee, but he was wrong in holding that the City had committed a breach of the duty it owed to a licensee. The only liability of an occupier towards a licensee is for a concealed danger of which he actually knew, and no actual knowledge of the City was established in this case. The utmost that could be found, on the trial judge's findings of fact, is constructive knowledge, which is not enough.

In any event the occupier of this park was not the City but the Commission. [AYLESWORTH J.A.: Do you contend that in the circumstances of this case management and control are synonymous with occupation?] Yes. [AYLESWORTH J.A.: The City does not seem to take the position in its by-law that it has no control over the park.] The park was in fact under the exclusive management and control of the Commission, which employed all meter-readers and others.

The trial judge was wrong in thinking that *Humphreys v. The City of London*, [1935] O.R. 91, [1935] 1 D.L.R. 300, affirmed with a variation [1935] O.R. 295, [1935] 3 D.L.R. 39, was conclusive on this point. It dealt with workmen's compensation, and did not discuss the question of control and management. *Young v. Town of Gravenhurst* (1911), 24 O.L.R. 467, followed in the *Humphreys* case, is inapplicable here, because this Commission is incorporated. It is only in the trial judgment in the *Humphreys* case that the Commission is held to be

the statutory agent of the City. This point was expressly left open by the Supreme Court of Canada in *Stevens et al. v. The City of Chatham*, [1934] S.C.R. 353, [1934] 3 D.L.R. 1. There is therefore no judgment binding on this Court to the effect that the Commission is the statutory agent of the City, and I submit that it is not.

If it is held that the occupier of this park was the Commission rather than the City, the action is barred because it was not brought within six months, as required by s. 31 of The London Waterworks Act, 1873, c. 102, and s. 32 of The Public Utilities Act, R.S.O. 1950, c. 320. (The Commission was originally created by s. 29 of the 1873 Act, and other legislation with reference to it is found in 1912, c. 107, s. 10, and 1914, c. 74, s. 7.) [PICKUP C.J.O.: The limitation in both statutes is in respect of "anything done in pursuance of this Act". What do you say is involved here that comes within those words?] The inspection and maintenance of the meter-box, which is an essential part of the Commission's duty to maintain and operate its waterworks system, under s. 2 of the Act. On the authority of *Wilson v. The Mayor and Corporation of Halifax* (1868), L.R. 3 Exch. 114 at 119, 120, "act done" includes an omission to do an act.

Apart from the six months' limitation there can be no liability on the Commission, because the evidence does not support a finding of actual knowledge by the Commission of this hidden danger, which is essential.

*E. J. R. Wright, Q.C.*, for the plaintiffs, respondents and cross-appellants: The action has been framed from the beginning against the Public Utilities Commission in the capacity given to it by The City of London Act, 1912, *i.e.*, as a parks board. At no time have we made any claim against it in its capacity as operator of a public utility, and therefore the limitation section in The Public Utilities Act has no application to the case. [PICKUP C.J.O.: Does that not mean that your claim against the Commission is against it only as agent of the City?] Yes, as exercising the powers vested in it by the 1912 Act.

As to knowledge, there is a finding of fact that the employees had knowledge, and in the circumstances this knowledge must be attributed to their employer, the Commission, and to the City as principal. [HOPE J.A.: But Mr. Walsh's position is that

there is no evidence to support that finding.] I submit there is ample evidence to justify the inference.

If the trial judge erred at all, he erred in not holding that the excavation itself, rather than the covering, constituted the danger, and that it was made more dangerous by the unsafe lid, which concealed the danger and gave it the appearance of safety.

The trial judge should also have held, as a matter of law, that the female plaintiff was an invitee, rather than a mere licensee. There was a consideration for the use of the park by the association to which the plaintiff belonged. All the cases relied on by the trial judge in this connection were concerned with people who used a park merely as members of the public, and there was no question of a consideration in any of them. I refer particularly to *Union Estates Limited v. Kennedy et al.*, [1940] S.C.R. 625, [1940] 3 D.L.R. 404.

The trial judge should further have found that in any event there was an implied contract that the picnic area was reasonably fit for the purpose for which it was to be used, and that there was a breach of this implied contract: *Francis v. Cockrell* (1870), L.R. 5 Q.B. 501.

I abandon my cross-appeal as to damages. The cross-appeal against the dismissal of the action as against the Public Utilities Commission is intended only to safeguard our position if this Court should find that it was the Commission rather than the City that was the occupant of the park.

*G. T. Walsh, Q.C.*, in reply.

*Cur. adv. vult.*

19th December 1952. The judgment of the Court was delivered by

PICKUP C.J.O.:—This is an appeal by the Corporation of the City of London (hereinafter referred to as “the municipal corporation”) from the judgment of Judson J. dated 18th October 1951. The action was tried without a jury. Judgment was given in favour of the plaintiffs against the municipal corporation, the plaintiff John William MacKinder recovering the sum of \$311.50 and the plaintiff Beatrice Viola MacKinder recovering the sum of \$1,900. The action as against the Public Utilities Commission of the City of London was dismissed without costs. The said Public Utilities Commission is hereinafter referred to as “the Commission”. The plaintiffs, by way of cross-appeal, ask for



judgment against the Commission, if the judgment in favour of the plaintiffs should have been against the Commission and not against the municipal corporation. The cross-appeal also asks that the amount of the damages awarded be increased, but that was not pressed at the hearing of the appeal.

The plaintiff Beatrice Viola MacKinder was injured on 27th June 1950, when she fell into an excavation which existed in Springbank Park, a park owned by the municipal corporation. The park, although owned by the municipal corporation, was under the control and management of the Commission. The Commission had constructed in the park an excavation in the ground, in which was placed a meter-box. The purpose of the meter was to measure the quantity of water supplied by the Commission to the village of Byron. This excavation was protected by a covering fitted over the box.

On the date of the accident the plaintiff Beatrice Viola MacKinder was a member of the Lorne Avenue Home and School Association, which association held a picnic in Springbank Park on that date. The association had obtained from the Commission a licence for the exclusive use on that occasion of one of the picnic areas in the park. A licence fee of \$1 was paid. While attending the picnic the plaintiff Beatrice Viola MacKinder, without any fault on her part, fell into this excavation by reason of the covering being defective, and was injured.

I concur in the findings of fact of the learned trial judge as stated in his reasons for judgment, and proceed to deal with the appeal on the basis that the excavation in question was, on 27th June 1950, a hidden danger known to employees of the Commission, whose duty it was to see that the covering over this excavation was kept in repair.

The excavation was not in itself a danger to persons lawfully resorting to the park, so long as the covering was kept in a proper state of repair so as to perform the function for which it was intended, namely, that of a covering over an excavation which would prevent persons using the park from falling into the excavation. The excavation was entirely hidden beneath the covering.

I agree with the learned trial judge that knowledge of the defective condition of the covering, which made the excavation a hidden danger, must be attributed to the Commission, it being

the duty of the servants of the Commission who knew of the existence of this hidden danger to report it to the Commission.

Counsel for the appellant contends that there is no statutory obligation cast upon the municipal corporation or upon the Commission in relation to the condition of the park, and that the only duty there can be in that regard is the common law duty of an occupant of premises toward a person lawfully using the premises as a licensee. He contends that the municipal corporation was not the occupant of the premises, and was, therefore, under no duty to the plaintiff. I think the municipal corporation was the occupant. The Commission had merely the management and control of the park for the municipal corporation. I agree with the learned trial judge, on the authority of *Humphreys v. The City of London*, [1935] O.R. 91, [1935] 1 D.L.R. 300, affirmed with a variation [1935] O.R. 295, [1935] 3 D.L.R. 39, that the Commission is in law the statutory agent of the municipal corporation and that any occupancy of the agent would be, in law, the occupancy of the municipal corporation. The municipal corporation was at all times the owner of the park and never at any time, so far as the record shows, conferred any right of occupancy or other interest in the park upon the Commission, the latter having nothing but control and management.

Counsel for the appellant also contends that there can be no recovery against the municipal corporation as occupant unless knowledge of the hidden danger be brought home to that corporation. Without deciding that it is necessary, in the facts of this case, that the municipal corporation should have actual knowledge of the defective covering over the excavation in question, I think that the knowledge of the Commission as to the existence of this hidden danger must be regarded as the knowledge of the municipal corporation.

I think it is plain on the findings of fact of the learned trial judge that the plaintiffs are entitled to judgment against one or other of the defendants, if their claims are not barred by the limitation provision hereinafter referred to. I think, subject to the effect of such limitation provision, it is the municipal corporation that is, in law, responsible and not the agent, the Commission.

The result is that the action was properly dismissed as against the Commission and the appeal by the municipal corpo-

ration should be dismissed unless the plaintiffs' action is barred by not having been brought within six months after the date of the accident.

Counsel for the appellant relied at the trial and on the appeal upon s. 31 of The London Waterworks Act of 1873, being 36 Vict., c. 102, and s. 32 of The Public Utilities Act, R.S.O. 1950, c. 320. The learned trial judge has held that neither section applies to bar the plaintiffs' action. I agree.

Section 31 of the 1873 Act provides as follows: "If any action or suit be brought against any person or persons for anything done in pursuance of this Act the same shall be brought within six calendar months next after the act committed, or in case there shall be a continuance of damages, then within one year after the original cause of action arising."

Section 32 of The Public Utilities Act above referred to provides as follows: "No action shall be brought against any person for anything done in pursuance of this Act, but within six months next after the act committed, or in case there is a continuation of damage, within one year after the original cause of action arose."

This action was not brought within six months after the accident complained of.

In this connection counsel for the appellant argues that the sections apply not only to *acts done* under the Act, but also to *acts omitted to be done* under the Act. Reference is made to *Wilson v. The Mayor and Corporation of Halifax* (1868), L.R. 3 Exch. 114 at 119, 120. I do not think the case referred to is of any assistance to the appellant. In it the Court was dealing with a statutory provision relating to an action brought "for anything done or intended to be done under the authority of the Act". The Court considered it settled by authority that an omission to do something that ought to be done in order to complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to an act done or intended to be done within the meaning of the clauses referred to. That is not this case. What is complained of in this action is not anything done under the statute of 1873 above referred to, or under The Public Utilities Act, nor is it anything which ought to be done to complete performance of a statutory duty, nor is it leaving any statutory duty unperformed. It is not anything



done or omitted to be done in the exercise of functions related to a public utility. What is complained of is a failure of duty in relation to a public park maintained by the municipal corporation. The plaintiffs' action is based upon the liability imposed at common law on the occupant of premises and the failure of such occupant to perform its duty to persons lawfully using the premises.

I do not think I need to decide in this case whether the plaintiff Beatrice Viola MacKinder was an invitee or a licensee. The learned trial judge has held that she was merely a licensee. The learned trial judge's judgment rests upon his finding that the occupant has failed in its duty to a licensee. I agree that there is such a failure of duty. *A fortiori*, there would be a breach of duty toward an invitee. It must be borne in mind in this case that the municipal corporation, through its agent, created in a public park a hidden excavation which was at all times a potential danger, and which would become an actual hidden danger to persons lawfully using the park if the hidden excavation were not guarded so as to prevent persons from falling into it. There may well be in such circumstances a duty on the occupant toward persons lawfully using the premises, even if only licensees, to see that a potential danger created by the occupant's own act does not become an actual hidden danger. It is, however, not necessary to decide this point in this case. I mention it, however, so that I will not be taken as agreeing with the suggestion that the municipal corporation or the Commission, in a case of this kind, can make a hidden excavation in a public park, protect it for the time being so that it is presently not dangerous, and later escape liability on the ground of lack of knowledge of its having become dangerous through lack of protection or warning.

The appeal of the municipal corporation should be dismissed with costs. The cross-appeal of the plaintiffs should be dismissed without costs, and there will be no costs of the appeal to the Commission.

*Appeal dismissed with costs.*

*Solicitors for the defendants, appellants: Mitchell & Thompson, London.*

*Solicitors for the plaintiffs, respondents: Wright & Poole, London.*

[JUDSON J.]

**Re Hommel Estate; Hommel v. The Treasurer of Ontario.**

*Succession Duties—Exemptions—Gifts—House Bought by Deceased but Title Taken in Name of Wife—The Succession Duty Act, R.S.O. 1950, c. 378, ss. 1(f), 4(1)(g), 5(c).*

A house was bought with money paid by a husband, but the conveyance was made to the wife. The husband continued to reside in the house with his wife until his death, more than five years later, and paid for substantial additions and improvements. On the husband's death succession duties were assessed against the house under s. 5(c) of The Succession Duty Act, but the wife claimed that the house was exempt as a gift under s. 4(1)(g).

*Held*, the subject-matter of the "disposition" was the money advanced by the husband which the wife used, doubtless on his direction, to buy the house. There was no "disposition" of the house as such, since there was nothing to indicate that the husband had ever had any beneficial interest in it. Even if there had been a "disposition" of the house itself it would still have been exempt as a gift under s. 4(1)(g), since the fact that the husband continued to live with his wife in the house was not a "benefit" retained by the husband. *The Lord Advocate v. M'Taggart Stewart et al.* (1906), 8 F. (Ct. of Sess.) 579; *The Attorney-General v. Secombe*, [1911] 2 K.B. 688; *Re Roach Estate* (1905), 10 O.L.R. 208, considered.

*Succession Duties — Exemptions — Non-commutable Annuities — Settlement of Insurance — Right to Call for Payments out of Principal — The Succession Duty Act, R.S.O. 1950, c. 378, s. 4(1)(i).*

A husband settled certain policies of insurance on his wife *inter vivos*, the terms of the settlement being that the proceeds of the policies were to remain on deposit with the insurance company on interest at a fixed rate, and the wife was to be entitled to receive the interest and in addition, if she desired, to call upon the company to pay her sufficient principal to make up \$5,000 in any one year.

*Held*, notwithstanding the power to call for payments of principal, this settlement constituted a "non-commutable annuity, income or periodic payment" within the meaning of s. 4(1)(i) of The Succession Duty Act, and was therefore exempt to the extent of \$1,200 per annum.

*Succession Duties — Appeal from Treasurer's Statement — Attempt at Hearing to Set up Alternative Basis of Assessment — The Succession Duty Act, R.S.O. 1950, c. 378, s. 32.*

On the hearing of an appeal from a statement of succession duties, under s. 32 of The Succession Duty Act, counsel for the Treasurer of Ontario sought leave to amend the "pleadings" so as to set up an alternative basis of taxation.

*Held*, no such leave should be given. There were no pleadings on such an appeal, the documents consisting of a notice of appeal, a notice of the Treasurer's decision, a notice of dissatisfaction, and a reply. The Department must take its stand in the Treasurer's statement, which was in reality an assessment, and an assessment for taxation could not be prepared in the alternative.

AN APPEAL by the widow of Robert R. Hommel, deceased, from a statement of succession duty payable.

25th November 1952. The appeal was heard by JUDSON J. at Milton.

*T. Sheard, Q.C.*, for the appellant.

*E. H. Sülk, Q.C.*, for the Treasurer of Ontario, respondent.

31st December 1952. JUDSON J.:—The first question is whether succession duty is payable on a residential property. The Department asserts the right to tax it as a dutiable disposition and values it at the date of death at \$43,000. Mr. and Mrs. Hommel first rented the property from a friend, Edythe MacKay. On 31st October 1939 Edythe MacKay granted the property to Grace M. Hommel for a consideration of \$3,000 cash and a mortgage back for \$10,000. The name of the husband, Robert H. Hommel, does not appear on the face of the transaction, but he supplied the \$3,000 cash and later paid off the mortgage. There is no evidence that there was any agreement in writing for the transfer of this property before the execution of the deed. The probabilities are against the existence of such an agreement in view of the relationship between grantor and grantee.

The property was still registered in the wife's name at the date of the husband's death. In addition to the original purchase-price of \$13,000 the husband, between 1939 and 1948, spent about \$23,000 on alterations and improvements. The husband and wife lived together in the house.

The case for the Department is that this was a disposition of a house in 1939 by a husband to his wife and that the wife, being a resident of Ontario at the date of death, must pay duty with respect to this disposition under s. 5(c) of The Succession Duty Act, R.S.O. 1950, c. 378. The case for the wife is, first, that the subject-matter of the disposition was \$3,000, or that, if it was the house, the disposition was made more than five years before the death and is exempt under s. 4(1)(g) of the Act.

I cannot see, on the material before me, that the husband ever had any property-interest of any kind in this house. The subject-matter of the disposition was \$3,000 which the wife used, doubtless on her husband's direction, to buy a house. "Disposition" is defined in the broadest terms by s. 1(f) of the Act. It is a transaction of some kind involving a transfer of property. But taxation is imposed, not on the transaction or the result of the transaction, but on a person with respect to the property-interest acquired by the transaction and the property-interest is to be valued according to the rules set out in s. 2 of the Act. I think the property-interest was \$3,000.



The case was also fully argued in the alternative on the basis that the property given by the husband to the wife was a house. Although I am not deciding the case on this ground, it is desirable that I express an opinion on it. At the date of death, the house was valued at \$43,000. The widow says she is still not taxable because it was given more than five years before the death. The Department answers that she is not entitled to this exemption, that she does not come within the terms of s. 4(1)(g) because she did not have possession and enjoyment of the house, the subject-matter of the gift, to the entire exclusion of her husband, or of any benefit to him.

Section 4(1)(g), the exempting section, reads: "any disposition to any person made more than five years before the date of death of the deceased, where actual and *bona fide* enjoyment and possession of the property in respect of which the disposition is made, was immediately assumed by the person to whom the disposition is made and thenceforward retained to the entire exclusion of the deceased or of any benefit to him whether voluntarily or by contract or otherwise, provided that this clause shall not apply to any disposition resulting in the making of periodic payments, except such payments made more than five years before the date of death of the deceased".

This section has a history. Something like it first appears in the English legislation which imposed an account or probate duty. This legislation was The Customs and Inland Revenue Act, 1881, 44 Vict. c. 12, s. 38. It was amended by 1889, c. 7, s. 11, and it was incorporated in The Finance Act, 1894, 57 and 58 Vict. c. 30, the legislation which established estate duty by s. 2(1)(c) as follows:

"Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . .

"(c) Property which would be required on the death of the deceased to be included in an account under section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by section eleven of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

The result of all this was that estate duty in the United Kingdom was imposed on "property taken under any gift whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise" (s. 38(2)(a) of the 1881 Act as amended by s. 11(1) of the 1889 Act). The section was taken into the Ontario Succession Duty Act in this form and it remained unamended until 1914. I shall deal later with the precise form of the amendment. It now appears with the 1914 amendment in s. 4(1)(g) of the Ontario Act as a condition to the establishment of a claim to exemption for a disposition made more than five years before death.

The very problem that arises here has been considered on almost the same facts, apart from the relationship of husband and wife, under The Finance Act of 1894. The cases are *The Lord Advocate v. M'Taggart Stewart et al.* (1906), 8 F. (Ct. of Sess.) 579, and *The Attorney-General v. Seccombe*, [1911] 2 K.B. 688. The first case involved a release of a life-interest by a mother in favour of a daughter, the second a transfer of the fee from an uncle to a nephew. In both cases the donor continued to live in the property after the gift, as he had done before, as a member of the household, not as a matter of right but as a matter of hospitality and grace. It was held that this continued residence did not deprive the property of its exemption from estate duty. The reason for so holding is that the "exclusion" and "benefit" contemplated by the section meant the absence of any legally enforceable right with respect to the property whether it arose from contract or otherwise. There was exclusion and there was no retained benefit if the donor merely continued his residence as a member of the family. Hamilton J. in the *Seccombe* case went further and held that the words "or otherwise" were to be construed as *ejusdem generis* with "contract". There is good reason to doubt whether this was a case for the application of the *ejusdem generis* rule (see Dymond's Death Duties, 11th ed. 1951, p. 14), but so far as I know the case has never been doubted for the proposition for which it really stands, namely, that exclusion means legal exclusion and benefit means a benefit arising from a right.

In 1914, by 4 Geo. V, c. 10, s. 5, the Ontario Act was amended by the addition of the words "whether voluntary or", so that the concluding words of the section read "to the entire exclusion of the donor, or of any benefit to him whether voluntary or by contract or otherwise". Even before the amendment and before the two above-mentioned cases were decided, *Re Roach* (1905), 10 O.L.R. 208, had held that a transfer from a father to his daughters was taxable when the father continued his residence in the property until his death. The reason for the decision is that this donor was never excluded from possession or enjoyment. In view of the reasoning of the *M'Taggart Stewart* and *Seccombe* cases, I seriously doubt the correctness of this.

My opinion is that in the present case the wife always had *bona fide* possession and enjoyment of the property and that the husband was excluded from all beneficial interest and that his occupancy of the property after its acquisition is attributable not to any benefit conferred upon him by his wife, but to the marriage relationship—to the fact that husband and wife are entitled to each other's society. This has nothing to do with the gift. The husband had no legal right to reside in the house. He lived there because he was married to the woman who owned it. I do not think this is the "benefit" meant by the section. To hold otherwise would mean that a wife could never get this exemption unless she and her husband parted company when the gift was made. I am not prepared to go as far as the submission of counsel for the appellant, to the effect that the addition of the word "voluntary" to the subsection in 1914 made no difference, and that benefit must still be some legally enforceable right or property-interest either in the subject-matter of the gift or in some collateral advantage. What I am saying is that cohabitation between husband and wife is not the "benefit" spoken of in the section.

These proceedings come before me by way of appeal from the Treasurer's statement. This statement is prepared on the basis of the house being a taxable disposition. At the hearing the Department sought to amend the "pleadings" by alleging that the husband was always the beneficial owner of the property. There are no pleadings to amend in proceedings under s. 32 of the Act. The documents are a notice of appeal, a notice of the Treasurer's decision, a notice of dissatisfaction and a reply.



The Department surely must take its stand in the Treasurer's statement, which is really an assessment. It is difficult to see how an assessment for taxation can be prepared in the alternative. The position taken in the Treasurer's statement is that the house was a gift. I heard evidence, taken subject to objection, which was intended to show beneficial ownership in the husband. The evidence was to the effect that the husband paid for the alterations and improvements and engaged the architects and contractors. Even if the house had been transferred originally from husband to wife, this evidence would not rebut a presumption of advancement.

The second point on this appeal is whether the proceeds of certain insurance policies, which were settled *inter vivos* on the wife by the husband, are exempt under s. 4(1) (i) to the extent of \$1,200 per year as a non-commutable annuity. Under s. 4(1) (i) there is an exemption in respect of "any non-commutable annuity, income or periodic payment effected in any manner other than by will or testamentary instrument and paid for by the deceased during his lifetime, and paid to or enjoyed by the wife or dependent father or mother or any dependent brother, sister or child of the deceased after the death of the deceased, to the extent of \$1,200 per annum with respect to any one person and to the extent of \$2,400 per annum in the aggregate".

The terms of the settlement are that the proceeds of the policies are to remain on deposit with the insurance company on interest at a fixed rate. The wife is entitled to receive the interest and in addition she may call on the insurance company to pay her sufficient principal to make up \$5,000 in any one year. This right to withdraw principal is non-cumulative. The wife has the right, on reaching the age of 65, to take whatever is left as a life annuity guaranteed for twenty years. There are no other rights of commutation or alteration given to the wife under the terms of the settlement.

It is the right to call for principal to bring the annual payments up to \$5,000 per year that attracts the attention of the Department. The argument is that with this privilege given to the wife, it is no longer a "non-commutable annuity, income, or periodic payment". An annuity is a sum of money payable yearly or periodically from a source which is exclusively or primarily

personal estate: 28 Halsbury, 2nd ed. 1938, p. 175, s. 321. The interest, without the power to encroach on principal, would clearly be entitled to the exemption. If fixed payments of blended principal and interest had been provided for, this would not have been attacked. Can it make any difference that the amount received by the wife may fluctuate within certain limits according to her request? I do not think so. The language of the exemption is broad; so is the legal meaning of annuity. I think the settlement is within the terms of the exemption to the extent of \$1,200 per year.

The appeal is allowed on both grounds with costs.

*Appeal allowed with costs.*

*Solicitors for the appellants: Johnston, Sheard & Johnston, Toronto.*

*Solicitor to the Succession Duty Office: W. D. Blair, Toronto.*

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[JUDSON J.]

**Industrial Development Bank v. Valley Dairy Limited and MacDonald.**

*Debentures and Bonds — Floating Charge — When Floating Charge Crystallizes — Issue of Writ — Priorities as against Statutory Liens and Execution Creditors.*

A floating charge on all the assets and undertaking of a company crystallizes on the issue of the writ to enforce the security. *Evans v. Rival Granite Quarries, Limited*, [1910] 2 K.B. 979 at 986, followed; *In re Hubbard and Co., Lim.* (1898), 68 L.J. Ch. 54, not followed; *In re Florence Land and Public Works Company* (1878), 10 Ch. D. 530; *Great Lakes Petroleum Co. Ltd. v. The Border Cities Oil Co. Ltd.*, [1934] O.R. 244, referred to. The floating charge will accordingly have priority over executions not completed before the issue of the writ in the bondholders' action, but not over those that were completed, or over statutory liens that attached, before the issue of the writ.

*Taxation — Income Tax — Statutory Lien for Unpaid Withholding Tax — What Constitutes "Assets" or "Property" of Taxpayer — Floating Charge — The Income Tax Act, 1948 (Can.), c. 52, s. 112(6) (amended by 1949, 2nd sess., c. 25, s. 44(1)).*

The statutory lien created by s. 112(6) of The Income Tax Act on the "assets" or "property" of a taxpayer, for withholding tax not remitted to the Minister, attaches to whatever is left to the taxpayer after the satisfaction of prior charges. *Sandberg et al. v. The Minister of National Revenue* (1949), 56 Man. R. 391, agreed with. The lien will therefore have priority over a floating charge that has not yet crystallized when the lien attaches, but not over one that has become crystallized before that time. The express provisions of s. 112(6) that the lien has priority over claims of Her Majesty in right of a Province has the effect of abrogating the principle laid down in *In re Silver Brothers, Limited*, [1932] A.C. 514.

*Executions — Effect of Garnishee Order nisi — Crystallizing of Floating Charge before Order Made Absolute.*

An execution creditor who completes his execution by making a seizure or obtaining a garnishee order absolute while a charge remains a floating one obtains priority over the charge, but a garnishee order nisi will not give him this priority. *Norton v. Yates*, [1906] 1 K.B. 112; *Evans v. Rival Granite Quarries, Limited*, *supra*, applied.

AN APPLICATION by the Sheriff of the County of Carleton for directions as to the disposition of moneys in his hands.

3rd October 1953. The application was heard by JUDSON J. in chambers at Ottawa.

*J. H. Hall*, for sheriff, applicant.

*K. A. Murchison*, for the plaintiff.

*J. D. C. Boland*, for the Minister of National Revenue.

*G. A. Ault*, for the Treasurer of Ontario.

*R. Robinson*, for the Unemployment Insurance Commission.

*R. A. Bell, Q.C.*, for execution creditors.

7th January 1953. JUDSON J.:—The Industrial Development Bank is the holder of a chattel mortgage from the defendant company. The chattel mortgage also contains a floating charge on all the assets and undertaking of the company, both present and future. The floating charge is in much the usual form and contains express power enabling the company, in the ordinary course of business, to deal with its property until the security becomes enforceable.

On 28th and 30th December 1949 certain execution creditors obtained garnishee orders nisi against debtors of the defendant company. On 7th January 1950 the plaintiff issued a writ to enforce its security. The writ was served on 9th January. On 11th and 12th January the execution creditors had their garnishee orders made absolute. On 14th January the Sheriff of the County of Carleton was appointed receiver to get in and administer the assets of the defendant company. The sheriff has in his hands three sums of money, (1) \$548.19, the proceeds of a seizure made under a writ of execution issued by one James Henry; (2) \$1,518.01 as a result of the garnishee orders; (3) \$375.70 collected by him in his capacity as receiver. The plaintiff claims the proceeds of these garnishee orders as property to which the floating charge attaches. The two Government Departments claim statutory charges ahead of everybody. The execution creditors resist both these claims.



The claim of the Minister of National Revenue is for withholding tax under s. 112 of The Income Tax Act, 1948 (Can.), c. 52. By subs. 4 of this section the amounts withheld are in trust for the Crown. By subs. 5 these amounts must be kept separate and apart from the employer's own moneys and do not form part of his estate in a liquidation, assignment or bankruptcy. Subsection 6 imposes a personal liability upon an employer who fails to remit the withholding tax and also imposes a first charge on his assets in these words:

"(6) Every person who deducts or withholds an amount under this Act is liable to pay to His Majesty on the day fixed by or pursuant to this Act an amount equal to the amount so deducted or withheld and this liability constitutes a first charge on his assets and, notwithstanding the *Bank Act*, the *Bankruptcy Act* or any other statute or law, ranks for payment in priority to all other claims including claims of His Majesty in right of a province or in any other right, of whatsoever kind arising before or after the commencement of this Act, except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets."

This subsection is not the present subs. 6, but it is the one in force when the Department's claim arose. The present subs. 6 was enacted by 1949, 2nd sess., c. 25, s. 44(1), and did not come into force until 1st July 1950. The old subsection made the withholding tax a first charge on the "assets" of the person under a duty to remit the withholding tax. The new subsection makes it a first charge on his "property".

The old subsection and the phrase "first charge on his assets" were considered in *Sandberg et al. v. The Minister of National Revenue*, 56 Man. R. 391, [1949] C.T.C. 35, [1949] 1 W.W.R. 117, [1949] 1 D.L.R. 422. There the Department sought a charge on moneys which an owner is required to withhold from a contractor for the purpose of discharging mechanics' liens. These moneys were held not to be assets of the contractor except to the extent of the surplus, if any, after the satisfaction of the mechanics' liens. The money on which the Department claimed its charge was subject to a prior charge in favour of lienholders. Except to the extent of the surplus it was not an asset of the taxpayer and in my opinion it was not his property.

My decision in this case is the same, whether the subsection reads "property" or "assets". At the time when the statutory lien imposed by subs. 6 attached there was no prior lien, charge or encumbrance on the property of the taxpayer. I am holding that the Department has priority over the Industrial Development Bank because the bank's floating charge had not become crystallized at the time when the statutory lien attached. If the floating charge had first become crystallized, I would have held that it had priority on the ground that "property" or "assets" means what is left to the taxpayer after satisfaction of prior charges.

The charge of the Province of Ontario is similar in character to that of the Department of National Revenue. Section 36 of The Corporations Tax Act, R.S.O. 1950, c. 72, makes the tax "a first lien and charge upon the property in Ontario of the company liable to pay such tax". The validity of this charge was established in the Court of Appeal in *Re General Fire-Proofing Co. of Canada Ltd.*, [1936] O.R. 510 at 520, [1936] 4 D.L.R. 88, 17 C.B.R. 371. The point was not argued in the Supreme Court of Canada: [1937] S.C.R. 150 at 161, [1937] 2 D.L.R. 30, 18 C.B.R. 159.

Section 112(6) of The Income Tax Act gives the charge created by that subsection priority over claims of Her Majesty in right of a Province. This abrogates the principle laid down in *In re Silver Brothers Limited; Attorney-General for Quebec v. Attorney-General for Canada*, [1932] A.C. 514, [1932] 2 D.L.R. 673, [1932] 1 W.W.R. 764, 13 C.B.R. 223, 53 Que. K.B. 418, where it was held that the charge of the Crown in right of Canada for sales tax under the old s. 17 of An Act to amend The Special War Revenue Act, 1915, 1922 (Can.), c. 47, and the charge of the Crown under the Quebec Corporations Tax Act, R.S.Q. 1909, art. 1357, ranked *pari passu*. The result is that the Department of National Revenue ranks first and the Treasurer of Ontario ranks second against all three funds in the hands of the sheriff.

The next question that I have to decide is when the floating charge crystallized. There is no doubt that the appointment of a receiver crystallizes a floating charge: *In re Florence Land and Public Works Company; Ex parte Moor* (1878), 10 Ch. D. 530 at 541; *Evans v. Rival Granite Quarries, Limited*, [1910] 2 K.B.

979 at 1001. There is doubt whether the issue of a writ in a debenture-holders' action will have the same effect. In one case it was held that the issue of a writ did not crystallize the floating charge so as to prevent the company from issuing further debentures of the same series: *In re Hubbard and Co., Lim.; Hubbard v. Hubbard and Co., Lim.* (1898), 68 L.J. Ch. 54. However, Vaughan Williams L.J. in *Evans v. Rival Granite Quarries, Limited, supra*, at p. 986, thought that the bringing of an action was sufficient. This is a leading case on the nature of a floating charge. It was followed in *Great Lakes Petroleum Co. Ltd. v. The Border Cities Oil Co. Ltd.*, [1934] O.R. 244, [1934] 2 D.L.R. 743. The opinion of Vaughan Williams L.J. was part of the *ratio decidendi* and I follow it and hold that the floating charge in question here crystallized on 7th January 1950, the date of the issue of the writ. Therefore as to the second fund of \$1,518.01 held by the sheriff by reason of the garnishee orders, the bank has priority over the execution creditors, for at the time when the floating charge crystallized the garnishee orders had not been made absolute. An execution creditor who completes his execution by obtaining a garnishee order absolute while a charge remains a floating one, obtains priority over the charge. A garnishee order nisi will not give him this priority: *Norton v. Yates*, [1906] 1 K.B. 112; *Evans v. Rival Granite Quarries, Limited, supra*. The bank has no claim against the first fund of \$548.19, this execution having been completed before the issue of the writ. This fund is, however, subject to the two statutory charges. They were in existence at the time of the seizure.

This leaves only the Unemployment Insurance Commission and the execution creditors. There is nothing for any of them. The Commission's claim is under s. 23 of The Unemployment Insurance Act, 1940 (Can.), c. 44. The section does not give the Commission any statutory charge for deductions made by an employer and not remitted to the Commission. Its position in a bankruptcy has already been considered in *Re Rosenberg et al.*, [1948] O.W.N. 637, [1948] 4 D.L.R. 205, 29 C.B.R. 103.

As to costs, one counsel, appointed by the Court, appeared on behalf of all the execution creditors. He should have his costs out of the funds in the hands of the sheriff. I think that this



is a case where I should make the same order for all parties represented on the motion.

*Judgment accordingly.*

*Solicitors for the Sheriff of the County of Carleton, applicant: MacCraken, Fleming, Beahen & Hall, Ottawa.*

*Solicitors for the plaintiff: Low, Honeywell & Murchison, Ottawa.*

*Solicitor for execution creditors: R. A. Bell, Ottawa.*

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[LEBEL J.]

**Wellman et al. v. Car-U-Drive Company Limited et al.**

*Motor Vehicles—Liability of Owner—Whether Car in Possession of Other Person without Owner's Consent—"Drive yourself" Agreement—Unauthorized Parting with Possession by Renter—The Highway Traffic Act, R.S.O. 1950, c. 167, s. 50(1).*

*Master and Servant—Vicarious Liability of Master—Servant Parting with Possession of Motor Vehicle, in Breach of Instructions—Injury Caused by Third Person—Whether Servant Negligent.*

M, employed as a chauffeur by C, rented from C D Co. a motor vehicle, to be used for purposes of C's business. Having completed his business, M, in violation of his instructions from C, and in breach of his agreement with C D Co., handed over the vehicle to D, who drove it and, in doing so, negligently injured the plaintiffs. The plaintiffs sued C D Co., C, M and D.

*Held*, the action must be dismissed as against all defendants except D. As to C D Co., it could be held liable only by virtue of s. 50(1) of The Highway Traffic Act, if it failed to establish that the car was in D's possession without its knowledge or consent. It had handed over possession of the vehicle to M alone, and so far as the evidence disclosed it did not even know D. At the time of the accident M was no longer in possession of the vehicle, having abandoned it, and the company was therefore not liable. *Wainio v. Beaudreault* (1927), 61 O.L.R. 356, applied; *McGrogan v. Hertz Drivursel Self Stations*, [1941] O.R. 348, referred to.

As to C, he was not in possession of the vehicle through his servant M, since, as had already been found, M had abandoned it. C could therefore be held liable only on the principles arising out of the relationship of master and servant, and it must be shown that D was his servant or agent. Although M should not have given possession of the vehicle to D, there was nothing in the evidence to show that he had been negligent in doing so, and the action must therefore fail as against both C and M. *Henderson v. Tudhope* (1930), 65 O.L.R. 238; *Ricketts v. Thos. Tilling, Limited*, [1915] 1 K.B. 644 at 648, applied.

AN ACTION for damages.

27th November 1952. The action was tried by LEBEL J. without a jury at Toronto.

*P. J. Bolsby, Q.C.*, for the plaintiffs.

*E. A. Richardson, Q.C.*, for the defendant Car-U-Drive Company Limited.

*B. C. F. Fraser*, for the defendant Cooper.

*L. W. Perry*, for the defendant Dewey.

8th January 1953. LEBEL J.:—This is an action for damages arising out of a motor vehicle accident.

Late on the night of 28th November 1949 the plaintiffs Wellman, now husband and wife, were walking on the sidewalk on the south side of Gerrard Street East in Toronto in the vicinity of a grocery-store owned by the plaintiff Cousins and operated by the plaintiffs McDonald and Greenside. The street was in an icy condition at the time and the defendant Dewey lost control of the panel truck he was driving, mounted the south curb, ran the Wellmans down and collided with the front of the grocery-store mentioned. The accident was the result of undisputed negligence on the part of Dewey.

The panel truck was owned by the defendant Car-U-Drive Company Limited and it had been hired or rented earlier in the day to the defendant Cooper, a florist, for the purposes of his business. Possession of the truck was taken by Cooper's employee, the defendant Marr, who signed the rental agreement, ex. 4. By the terms of this document, Marr became the "Renter" for certain purposes and he covenanted that the vehicle would not, under any circumstances, be operated by any person other than himself.

After delivering flowers in the afternoon and early evening, Marr drove the truck first to his home, where he had his supper, and then to the home of a girl friend. He admitted that his instructions were to return the truck to Car-U-Drive when he had finished making his deliveries and that he had disobeyed his orders. There were two or three other girls at the home of his friend and Marr took them all for a ride in the truck. At the intersection of Jones and Gerrard Streets he met the defendant Dewey, who was driving a truck belonging to his own employer. At that time, or a little later, two of the girls went over to the truck driven by Dewey and he and Marr changed trucks. The arrangement was that Dewey was to follow Marr and drive the vehicle later involved in the accident back to the Car-U-Drive place of business on Richmond Street. When Marr arrived there in the truck belonging to Dewey's employer he waited for some time and then, returning along Gerrard Street, came upon the scene of the accident.

Both Marr and Dewey were under the age of 21 years at the time of the accident but both were licensed chauffeurs.

The plaintiffs contend that the defendant Car-U-Drive Company Limited is liable as owner of the truck driven by Dewey under s. 50(1) of The Highway Traffic Act, R.S.O. 1950, c. 167. By this subsection the owner is liable "unless the motor vehicle was without the owner's consent in possession of some person other than the owner or his chauffeur".

Marr is the person to whom this defendant gave possession, and Marr in turn gave possession to Dewey in breach of his agreement. So far as the evidence goes, this defendant did not even know Dewey. The facts in this case are thus practically on all fours with those in *Wainio v. Beaudreault*, 61 O.L.R. 356, [1927] 4 D.L.R. 1131. It is to be noted that in that case, as here, the person originally given possession was not in the vehicle at the time of the accident. The headnote of the report of that case in 61 O.L.R. reads in part:

"A motor vehicle was lent by its owners to B., with permission to drive it upon the highway, but upon the express arrangement that no person other than B. should drive it. B. handed over the vehicle to J., who at first drove it upon the highway, and then permitted a woman to drive it, he remaining at her side. While she was driving, the car got out of control, ran up on the sidewalk, and injured the plaintiff and his wife:—

"*Held*, that the vehicle was, at the time of the accident, in the possession of J., and the woman without the consent of the owners, within the meaning of sec. 42(1) of The Highway Traffic Act, 1923, and that the owners were not liable for the injuries to the plaintiff and his wife."

Marr was not, following this reasoning, in possession of the truck involved in the accident; he had abandoned it. The defendant Car-U-Drive Company Limited is not, therefore, liable to the plaintiffs. It is true that when the *Wainio* case was decided the pertinent section of the Act read differently, but the statutory amendments made since have not, in my opinion, altered the real meaning and effect of the language I have quoted from the present s. 50(1). See also *McGrogan v. Hertz Drivurself Stations*, [1941] O.R. 348, [1942] 1 D.L.R. 564.

The plaintiffs next argue that the defendant Cooper, the florist, is liable on the ground that the truck was rented by



this defendant and entrusted to his chauffeur Marr and that at the time of the accident this defendant was in possession. But I have found that Marr was not in possession at the time of the accident, and if this defendant is to be held liable, his liability must rest upon the relationship of master and servant, and it must be shown that at that time Dewey was his servant or agent. That this is so was decided in a case that differs in only one circumstance from this case. That case is *Henderson v. Tudhope*; *Tudhope v. Henderson*, 65 O.L.R. 238, [1930] 3 D.L.R. 245. The headnote in 65 O.L.R. reads in part:

"In June, 1929, a collision took place upon a highway between two motor-vehicles, one driven by H., and the other, the property of the C. company, by T., an employee of that company. An action was brought by H. against T., one D., and the C. company, and a cross-action by T. and the C. company against H. The actions being tried together, the trial Judge found that T. was wholly to blame for the collision, and exonerated H., giving judgment against T. (which was affirmed upon appeal), and also against the C. company, by reason of what was taken for granted as the statutory law, the Judge and counsel apparently not being aware of or having forgotten the amendment. D. was an employee of the C. company and was entrusted with that company's motor-vehicle for use in the company's business. D. allowed T. to drive the vehicle, also upon business of the company. The collision occurred when T. was driving; D. was not in the vehicle; and there was nothing to indicate that T. was not a competent driver—he had no licence at the time, but had had one and had driven one of the company's motor-vehicles at one time. Negligence of D. in authorising T. to drive the vehicle was not shewn, and it was not 'proved that the person who did the act was the agent of the master in doing it:'—

"*Held*, therefore, upon appeal by the company, that there was no liability on the part of the company at the Common Law."

It will have been observed that the plaintiff failed against C. company where the fact that D. and T. were both its employees was stronger in the plaintiff's favour. In the case at bar Dewey was not, of course, employed by the defendant Cooper.

The *Henderson* case, at p. 241, approves and applies as law the following test laid down by Buckley L.J. in *Ricketts v. Thos. Tilling, Limited*, [1915] 1 K.B. 644 at 648:

“If the act which was done by a person who ought not to have done it, was not done by reason of any act of negligence on the part of the person authorised to do the act, then it must be proved that the person who did the act was the agent of the master in doing it.”

As I have said, both Marr and Dewey were licensed chauffeurs, and there is nothing in evidence to establish that Marr was negligent in allowing Dewey to drive. He ought not to have allowed him to drive the truck back to the Car-U-Drive place of business, but he was not negligent in permitting him to do so.

The action also fails, therefore, against the defendants Cooper and Marr.

I now proceed to assess the damages suffered by the plaintiffs.

The plaintiff Clarence M. Wellman sustained an injury to his left leg and knee and some superficial injuries. The knee was first sutured and later immobilized in a cast—knee to hip—for a little over a month from 14th December 1949. After the cast was removed he received physiotherapy treatments for about eight weeks. For a time this plaintiff said he felt the knee “slip out of joint” but he said at the trial that the knee had not bothered him for six months. He endured pain and inconvenience and he was off work for a period of ten weeks, losing some \$533.36 in wages as a result. His hospital and medical accounts amounted to \$131.50; his clothing, valued at \$100, was ruined, and he was required to hire a taxi to take him to hospital for treatments. His special damages proved amount therefore to \$789.86. I assess his general damages at \$1,000 and his total damages, therefore, at \$1,789.86.

The plaintiff Margaret Wellman suffered an injury to her back and also superficial injuries. She was in hospital for five days. She was required to wear a support for a year, and according to Dr. Bateman, her physician, she retains some discomfort and has some pain and tenderness on making some movements—she said when she bends down or forward or to the left. She also suffered a nervous upset lasting some months. She was off work for six weeks and lost wages amounting to \$132. Her out-of-pocket expenses amounted to \$122.50. I assess her general damages at \$1,500 and her total damages at \$1,754.50.

The premises of the plaintiffs McDonald and Greenside were damaged by the truck driven by Dewey and the repairs cost \$531.35; the value of stock-in-trade destroyed amounted to another \$100, so that the damages of these plaintiffs are assessed at \$631.35.

No damages were proved to have been suffered by the plaintiff Cousins, the owner of the grocery-store, and his action will be dismissed, but without costs.

There will be judgment for the other plaintiffs against the defendant Dewey for the amounts I have assessed in their favour, and the action against the other defendants will be dismissed with costs.

The plaintiffs were justified in bringing action against all the defendants in the circumstances and they may add the costs they are required to pay the successful defendants to the amount of their judgment against the defendant Dewey. The latter is an infant and the Official Guardian was appointed his guardian *ad litem*. The plaintiffs may, therefore, also add the Official Guardian's costs, as between solicitor and client, to their judgment, as was done in *Petrie v. Speers Taxi Limited et al.*, [1952] O.R. 731.

*Judgment accordingly.*

*Solicitor for the plaintiffs: Wilmer H. Reid, Toronto.*

*Solicitors for the defendant company: Richardson & Shearer, Toronto.*

*Solicitors for the defendant Cooper: Salter, Reilly & Jamieson, Toronto.*

*Guardian ad litem of the defendant Dewey: Percy D. Wilson, Official Guardian, Toronto.*

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[LEBEL J.]

**Canada Permanent Mortgage Corporation v. The City of Toronto.**

*Municipal Corporations — Borrowing — Powers of City Treasurer — Fixing Rate of Exchange on Debentures Payable in Sterling — The City of Toronto Debt Consolidation Act, 1889 (Ont.), c. 74.*

Debentures of the defendant City, maturing in 1948, were expressed on their face to be payable in England, but the plaintiff, holder of £20,000 of these debentures, claimed a declaration that they were payable in New York or Toronto, at the option of the holder, and that they were payable in dollars "at the par of exchange" (\$4.86 2/3 to the pound sterling) rather than at the rate of exchange prevailing at the time of their maturity. In support of this contention the plaintiff relied upon two letters written by the city treasurer under the corporate seal, agreeing to change the place of payment, and further stating that payment would be made "at the par of exchange".

*Held*, the action must fail. Although the terms of the by-law providing for the issue of the debentures were wide enough to enable the treasurer, acting with the mayor (whose concurrence must be assumed in the circumstances of this case), to change the place of payment, there was nothing in the by-law, or in the enabling legislation of the Province of Ontario, to authorize either or both of these officials to fix or "peg" the rate of exchange. What was clearly contemplated was an issue of debentures payable according to the true rate of exchange existing at the time of payment.

AN ACTION for a declaration.

1st October 1952. The action was tried by LEBEL J. without a jury at Toronto.

*R. N. Starr, Q.C.*, for the plaintiff.

*F. A. A. Campbell, Q.C.*, and *J. Johnston*, for the defendant.

8th January 1953. LEBEL J.:—This action is for a declaration that the principal and interest owing on certain debentures issued by the defendant corporation on 1st July 1909, which matured on 1st July 1948, "are payable at the par of exchange, namely, \$4.86 2/3 to the Pound Sterling at The Canadian Bank of Commerce, New York City, or at The Bank of Toronto, Toronto, at the option of the holder in United States dollars or Canadian dollars respectively", and for consequent relief.

The debentures owned by the plaintiff are part of an issue of \$250,000, and both principal and interest are expressed on the face of the securities and the coupons to be payable "to the Bearer at Lloyds Bank (Limited) London, E.C., England". Despite this, the plaintiff's contention is that the debentures are in reality what is termed "three-way debentures", *i.e.*, payable in New York, Toronto and London. The face value of the debentures is £20,000, and if the plaintiff must accept payment at the sterling rate of exchange in effect on 1st July 1948, the date of maturity, as the defendant maintains, the difference in dollars

will be substantial. On 2nd July 1948 the plaintiff company forwarded its debentures, together with the coupons payable on the date of maturity, to its bankers to be surrendered "for redemption at the par rate of exchange, namely \$4.86 2/3", to the pound sterling, and said that it was entitled to receive £20,400 "which at the above rate are equivalent to \$99,279.99" (see ex. 11). The defendant corporation then took and still takes the position that the plaintiff company is entitled to receive payment at the rate of exchange for sterling prevailing on 1st July 1948, which was said to be about \$4.02, and, relying upon the express language on the face of the debentures and the coupons, it denies that the plaintiff company is entitled to payment either in New York or Toronto.

In support of its contention that the debentures are payable "three ways", the plaintiff relies upon the terms of a letter written on 18th November 1911, by the treasurer of the defendant corporation to a former firm of Toronto brokers, the material parts of which read as follows (see ex. 2) :

"Messrs. G. A. Stimson & Company,  
Stock Brokers,  
Toronto.  
Gentlemen:

"I write with reference to the following Debentures which you purchased from the City of Toronto:

. . . . .  
"By-law No. 5338

Debentures Nos. A. 14180 to A. 14250 71 @ £500 each £35,500

. . . . .

"In compliance with your request and in order to suit the convenience of your client, this Corporation will make payment of principal and interest either at The Canadian Bank of Commerce, New York City, or the Bank of Toronto at Toronto, (your clients to decide which Bank) instead of at London, England. Payment will be made at the par of exchange (9½%).

"Given under the Seal of the Corporation of the City of Toronto this Eighteenth day of November, A.D. 1911.

"R. T. COADY."  
"Treasurer."

That this letter was written by the defendant's treasurer is admitted in the statement of defence. The defendant filed a second letter also written by the defendant's treasurer to the same brokers on 9th December 1911 (ex. 18). This, like ex. 2, is a copy rather than the original, but its existence is expressly pleaded by the plaintiff company in para. 9 of its statement of claim. This letter reads in its material parts as follows:

"Messrs. G. A. Stimson & Co.,  
16 King Street West,  
Toronto.

Gentlemen:

*Re £108,900 City of Toronto 4% Debentures, due 1948*

"I write you, in reply to your letter of the 8th inst., respecting the following City of Toronto Debentures purchased by you:

. . .  
"By-law No. 5338

Nos. A14180 to A14250 71 Bonds @ £500 £35,500

. . .  
"In order to suit the convenience of your client, this Corporation will make payment of the principal and interest of these Debentures at the Canadian Bank of Commerce, New York City, instead of at London, England. Payment will be made at the par of exchange (9½%).

"Given under the Seal of the Corporation of the City of Toronto this ninth day of December, A.D. 1911.

"R. T. COADY."

"City Treasurer, Keeper of Civic Seal."

It is to be noted that this last letter is said to be in reply to one from the brokers written the day previous. The treasurer's letters of 18th November and 9th December must be read together to make them consistent, and it must be assumed, I think, that the brokers, following receipt by them of the treasurer's first letter, were instructed by their principals to elect payment of principal and interest at the Canadian Bank of Commerce, New York, instead of at the Bank of Toronto, Toronto. The treasurer's first letter gave them the right to elect either of these places instead of London, England.

Mr. Campbell argues that the city treasurer was without authority to write these letters, but I am satisfied that, when acting with the mayor, he was authorized to do what he appears



to have done, to this extent, *viz.*, to make the place of payment New York instead of London. Paragraphs I, II and III of By-law 5338 of the defendant corporation in my opinion provide the necessary authority. These paragraphs read:

“I. It shall be lawful for the Mayor of the City of Toronto and the City Treasurer to raise by way of loan, upon the security of the debentures hereinafter mentioned, from any person or persons, body or bodies corporate, who may be willing to advance the same upon the credit of such debentures, a sum of money not exceeding in the whole the sum of \$250,000, and to cause the same to be paid into the hands of the Treasurer of the said City, for the purposes and with the objects above recited.

“II. It shall be lawful for the said mayor and treasurer to cause any number of debentures to be made for such sums of money as may be required for the purposes aforesaid, either in currency or sterling money, payable in gold coin, for not less than one hundred dollars currency, or twenty pounds sterling each, and not exceeding in the whole the said sum of \$250,000, and that the said debentures shall be sealed with the seal of the said Corporation, and be signed by the Mayor and the Treasurer.

“III. The said debentures shall bear date the first day of July, 1909, and shall be made payable on the first day of July, 1948, either in currency or sterling, in Canada, Great Britain, or elsewhere, and shall have attached to them coupons for the payment of interest.”

The fact that the mayor did not sign the letters making the change in the place of payment is not material since the letters bore the impression of the corporation's seal and the mayor would appear to have approved of the change as the minutes of the defendant corporation's treasury board (ex. 5) plainly show. Undoubtedly the mayor and the treasurer would have had authority under the by-law to instruct the defendant's printers to make the change on the face of the debentures and coupons, had they wished to do so; and they chose the method they followed, no-doubt, because it was in accordance with the treasurer's practice at the time. Whatever one might think of the practice, there were a number of such letters called “special letters” in existence (see ex. 10).

In view of the meaning of this correspondence, the debentures were not payable three ways in my opinion. As I have found,

they were simply made payable in New York instead of in London. They appear, however, to have been regarded as "payable three ways"; not only did the brokers who sold them to the plaintiff company so regard and represent them, but the debentures were shown to be such for many years by the defendant's own records.

However, that is not the crux of the problem, and hence the reason for this litigation. The cause of the trouble is in the depressed exchange value of the pound sterling. I was told that it fell below par in 1939 and that it has never recovered. As I have said, it stood at about \$4.02 at the date the debentures matured; and the defendant corporation has offered to redeem them at that rate of exchange.

The plaintiff's claim, as I indicated at the outset, is that it is entitled to be paid "at the par of exchange, namely, \$4.86  $\frac{2}{3}$  to the Pound Sterling at The Canadian Bank of Commerce, New York City, or at The Bank of Toronto, Toronto, at the option of the holder in United States dollars or Canadian dollars respectively". If this is so, the plaintiff's right depends upon the treasurer's authority, acting with or without the mayor, to bind the corporation when he said in both letters "payment will be made at the par of exchange ( $9\frac{1}{2}\%$ )"—that is to say, according to the evidence, \$4.86  $\frac{2}{3}$  to the pound sterling. That covenant or undertaking is a very substantial one, and I am unable to find anything in the evidence which authorizes the mayor and/or the treasurer to make it. In my view, it changes the very nature of the security itself. What the Province of Ontario's enabling legislation, *viz.*, The City of Toronto Debt Consolidation Act, 1889, 52 Vict., c. 74, and the defendant corporation's By-law 5338 both clearly contemplate and authorize is a debenture payable in Canada or England or elsewhere according to the true rate of exchange existing at the time of payment, not according to a rate of exchange that could be fixed or "pegged" by the mayor and/or the treasurer. In 1911 the peoples of the world regarded the position of the pound sterling as impregnable, or almost so, and hence no person would have been surprised at an agreement made at that time to pay \$4.86  $\frac{2}{3}$  for it. That is the reason, probably, why the treasurer did not think the point of sufficient importance to

mention it in his report to the defendant's treasury board on 13th November 1911 (see ex. 5).

It is plain that By-law 5338 did not give the mayor and treasurer, much less the treasurer, authority to "peg" the value of the pound for purposes of the redemption of these securities or for payment of interest. Surely the intention was that they were to be valued at whatever value they attained in the free market. Moreover, had the by-law authorized the defendant's officials to fix a certain rate of exchange for the pound, I would doubt its validity under the enabling legislation mentioned.

I find nothing in the evidence which supports the plaintiff's contention that the defendant corporation is now estopped from asserting that the agreement to pay \$4.86  $\frac{2}{3}$  to the pound sterling was made without authority. The fact that the defendant corporation has probably gained more than it lost over the years by paying interest on the securities at that rate of exchange does not, in my view, assist the plaintiff's case.

The action will be dismissed with costs.

*Action dismissed with costs.*

*Solicitors for the plaintiff: Sinclair, Goodenough, Higginbottom & McDonnell, Toronto.*

*Solicitor for the defendant: W. G. Angus, Toronto.*

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[JUDSON J.]

[COURT OF APPEAL.]

**Clemens v. Crown Trust Company et al.**

*Parent and Child—Presumption of Advancement—Whether Presumption Rebutted—Father and Son with Same Name—Registration of Shares of Stock—Ownership.*

J.J.C., who generally used the name J.C.C. in his business dealings, caused a block of 3600 shares, and another block of 1000 shares, to be registered in the name J.J.C., which was also the name of his son, then aged about 15 years. The father retained possession of the share certificates until, some 14 years later, he executed a trust agreement for the benefit of his son, transferring to the trustee the 1000-share block of shares. He sold 300 shares of the other block. After the father's death the son sued the executors of the father's estate for a declaration that the 3300 shares were the son's property, and for other relief.

*Held*, the action must fail.

*Per* JUDSON J. (the trial judge), and HENDERSON, HOPE and AYLESWORTH J.J.A.: The name J.J.C. in which the shares were registered was that of the father, and he never parted with dominion over any of the shares until he set up the trust. The son never had any interest in the 3600-share block, and the shares of that block remaining when the father died were consequently part of his estate.

*Per* HOGG J.A.: The name in which the shares were registered was that of the son, and the presumption of advancement therefore applied. There were no contemporaneous acts or declarations of the father that could rebut that presumption, but subsequent acts and declarations of the son did have the effect of rebutting the presumption, and the son was therefore a trustee of the shares for his father's estate.

*Per* AYLESWORTH J.A.: Even if the presumption of advancement had been applicable (which it was not) the son's subsequent conduct was sufficient to rebut the presumption, and the action must fail on this ground also.

*Per* LAIDLAW J.A., *dissenting*: The shares were registered in the name of the son, the presumption of advancement was applicable, and there was nothing in the evidence that served to rebut that presumption.

AN APPEAL by the plaintiff from the judgment of Judson J., *infra*, dismissing the action.

28th April to 1st May 1952. The action was tried by JUDSON J. without a jury at Sudbury.

V. H. Little, for the plaintiff.

E. C. Facer, Q.C., for the defendant.

1st May 1952. JUDSON J. (orally):—The plaintiff is suing the executors of his father's estate to recover from them 3300 shares of stock of International Nickel Company of Canada Limited which, he says, belong to him, and he is also suing the executors because he says they wrongfully delivered 400 of these 3300 shares that belong to him to his sister Elizabeth, and also delivered to his sister Elizabeth 200 shares of International Nickel that belonged to the estate.

The plaintiff's name is John Joseph Clemens, and the style of cause refers to the estate as the "John C. Clemens Estate". I wish to say a word or two by way of explanation of those names so that confusion will not appear later in my reasons for judgment. The plaintiff, the son, is John Joseph Clemens. The father was known throughout the greater part of his business dealings as John C. Clemens, but the father's real name was also John Joseph Clemens. That name appears on his birth certificate and on his baptismal certificate. As I shall mention later, he made a considerable use of that name, and to avoid confusion I shall refer to the two as the son and the father respectively.

In spite of the fact that more than a hundred exhibits have been filed in this case, the point is really a narrow one. In 1929 the shares of International Nickel were split six for one, and following this stock split the father caused 3600 shares to be registered in the name John Joseph Clemens. This was in January 1929. At that time the son was a boy of 15 or 16. In the same month, January 1929, he also caused to be registered a large number of shares in the names of the other members of his family. I am not going to deal with those at the moment; I shall confine my attention to those that he registered in the name John Joseph Clemens, and I have mentioned that these were, first of all, 3600 shares. The original address for that share account was Sudbury, Ontario, and it was changed in 1943 to The Trusts and Guarantee Company Limited of Toronto, the father's executor.

In the month of January 1929 the father also caused to be registered in the name John Joseph Clemens a further 1000 shares. Those apparently he purchased through various brokers, but I am not saying that the date of the registration was the date of the acquisition of the shares or their predecessors. All that I can say from the evidence is that on that date (26th January 1929) he caused 1000 of the split shares to be registered in the name John Joseph Clemens, and he held those in a separate account. The address for that account was first given as 1243 East Grand Boulevard, Detroit, Michigan, and then in 1930 it was changed to 1211 East Grand Boulevard, Detroit, Michigan, and then after the father's death it was changed to 209 College Street, Sudbury.

These accounts were never consolidated, and there are instructions on the accounts that they are not to be consolidated. Of the 3600 shares, the father sold 300 in 1933, leaving him with 3300. It is those 3300 shares that the plaintiff claims in this action.

Let me go back to identify the certificate numbers that were issued for the two blocks of shares. For the 3600 shares the certificates issued were nos. 9610 to 9645. For the 1000 shares they were nos. 9704 to 9713. The 300 sold, that I have just mentioned, were nos. 9610 to 9612.

The plaintiff's case is that from the moment of acquisition of those 3600 shares in 1929 they became his property. He submits that they were registered in his name and that there is a presumption of advancement because of the relationship of father and son, that this presumption has not been rebutted and cannot be rebutted by anything that occurred subsequent to the registration.

I shall deal with what did occur subsequently in chronological order. First, on the 9th February 1939 the father made another will. He had made a will in 1933, naming the Capital Trust Corporation his executor. In that will he described himself as John C. Clemens. In the 1939 will he described himself as "John Joseph Clemens, sometimes known as John C. Clemens". That was obviously his own doing. The will reflected the instructions that he gave to his solicitor or a representative of the trust company. In 1941 he made a codicil to that will, using the same names—the only purpose of the codicil was to substitute a son-in-law for a brother-in-law as co-executor. Then he made another will in September 1942, describing himself as "John Joseph Clemens, sometimes known as John C. Clemens", and on 12th December 1942 he made his last will, the will that has been probated. The difference between the last will and the one before it was this: He inserted a spendthrift clause in the last will in connection with the benefits conferred upon his son John.

About the time that he gave instructions for his last will, or executed it, the father also gave instructions for the preparation of two trust agreements, one for his son John and one for his son Richard. There is no doubt whatever that he was the one who gave instructions for the preparation of those trust



agreements; the sons had nothing to do with the instructions. The trust agreements were drafted in accordance with the father's instructions by a solicitor in the employment of the trust company. They were submitted to the father and he, after considering the draft of John's trust agreement, gave instructions that a spendthrift clause be inserted. The shares of International Nickel which, according to his instructions, were to go into the trust were those that I have referred to as the 1000-share account, with the address in Detroit. The documentary evidence filed shows how those precise shares got into the trust, with the exception of one share certificate. Those certificates, as I have said, were numbered 9704 to 9713. The father caused nine of these certificates to be transmitted to the trust company. He did that in Windsor on his way to Detroit, to the hospital where he died. One of the certificates, no. 9704, was not available and was not found until some considerable time later. The father had pledged that particular certificate with the Imperial Bank in Sudbury in support of his guarantee of a loan for some other person. This trust agreement, then, at the time of execution could include only 900 shares out of the block of 1000, and the schedule was prepared accordingly; it refers to only 900 shares, and not to 1000 shares. The trust agreement was brought to Sudbury by Mr. Miller, an officer of the trust company, and it was executed by the plaintiff, and my finding is that the schedule for 900 shares was attached when it was executed.

The plaintiff says that he thought that the shares included in the trust were in addition to those that he considered he owned, and that his father was making a gift to him of additional shares. I definitely reject that view. I think the son knew perfectly well at that time what he was getting, and from what source. I will go into the evidence on that point in a moment. It was the father's intention to include ten 100-share certificates; only nine of them were available at that time. Five hundred shares of Consolidated Bakeries that were also to go into the trust were not immediately available. Therefore the trust, as drawn and executed, referred to only 900 shares of International Nickel. After the father's death the certificate for the 100 shares was found in the Imperial Bank at Sudbury. It was subject to a loan. Therefore the trust company put into

the trust fund another 100 shares of International Nickel and 500 shares of Consolidated Bakeries. I have not referred to the Bakeries shares before, but the father had given instructions that they were to be included in the trust.

Therefore, shortly after the death of the father, this trust consisted of the 1000 shares of International Nickel and 500 shares of Consolidated Bakeries. Subsequently the son brought action against the trust company claiming that the extra 100 shares of International Nickel and the 500 shares of Consolidated Bakeries, purportedly in the trust, were not subject to the terms of the trust because they had not been included at the time of the execution of the agreement, and by a judgment of this Court effect was given to that submission, and he got the 100 shares of International Nickel and the 500 shares of Consolidated Bakeries free from the trust.

My finding is that when that trust was consolidated in December 1942 the son knew perfectly well where the shares were coming from, and he knew perfectly well that those were the only shares that his father intended him to have.

There was put in correspondence between Mr. Brunton, a chartered accountant of Sudbury, and the Bankers Trust Company, relating to the registration of those two blocks of shares, the 3600 block and the 1000 block. At the time of the correspondence the 3600 block had been reduced to 3300 by the sale of the 300 shares. Mr. Brunton also said that the son wrote a letter to the Bankers Trust Company on 28th December 1939 about these two blocks of shares. The object of the correspondence was to have the 1000-share block registered in the name of "John Joseph Clemens Junior", leaving the 3300-share block registered in the name of the father. In conducting the correspondence Brunton was acting as the agent of both father and son, and the son himself wrote the letter I have referred to because of the insistence of the Bankers Trust Company. He also received a letter from this company giving particulars of these two blocks of shares. This letter was addressed to John Joseph Clemens Junior, and I am going to apply the ordinary presumption that any letter that is sent is received in the ordinary course of post, and that therefore the son knew as early as 1939 or 1940 what the position was with reference to these shares, namely, that the father intended him to have the 1000-share block but not the 3300-share block. My finding is

that the son never had any thought that he was the owner of the 3300-share block, or any part of it, until he began this action to assert a claim after other family litigation had been decided against him.

The evidence is clear and uncontradicted that these shares, the 3300 block and the 1000 block, and all other shares bought and registered in the names of other members of the family, were bought out of the funds of the father. Neither the son nor any other member of the family made any contribution to their purchase. The father always retained possession of the certificates for all the shares bought by him, no matter in whose name they were registered. At some time he began to report the income from the 1000-share block on the son's income tax return, although the father paid the tax. There is evidence from Brunton that this was being done by 1940 or 1941. The son knew that the income was being so reported. I am quite sure that the father never told the son that all the shares registered in the name of John Joseph Clemens were the property of the son. All the actions of the father, all his conduct with reference to these shares, is entirely inconsistent with any such statement on his part, and I definitely do not accept the evidence of the son when he attributes this statement to his father.

The evidence is that the father at some time kept the share certificates in a safety-deposit box in the Bank of Toronto at Sudbury. This box was in the joint names of his two sons John and Richard, but the father kept the key, and he took one son or the other to the bank when he wished to have access to the box, and had one son or the other sign to give him access, but he never permitted them to have access, never permitted them to have the key, and never permitted them to examine the contents of the box.

As far as these two blocks of shares are concerned, I am of the opinion that, until he chose to put the block of 1000 shares into the son's trust fund, they were all the father's shares to do as he liked with. He had made no effective gift of any of the shares, and it was only when he put the 900 shares in the trust fund for the plaintiff that he parted with dominion over that 900. He never parted with dominion over the rest of the shares. In other words, my finding is that he bought the shares with his own money, put them in his own name, as he was



perfectly entitled to do, even although it happened to be also the name of his son, and retained dominion over all of them until he constituted the trust fund for the son John.

Even if it could be said that in 1929, when the father put the shares in the name of John Joseph Clemens, he had in mind, in using that name, his son John and not himself, he never had any intention at all that his son John should become the owner of them. If he was using the son's name, he was using it as a mere *alias* for the purpose of holding these shares. But there is nothing that would lead me to conclude that the father was using his son John's name in this particular account—he was using his own name. When I make that statement I am well aware that he put a large number of shares in the names of his other two children and his wife, and there could not be any confusion as to name when he put the shares in these other names, but the course of dealing with these shares makes it clear that he never regarded any of them as owners of the shares that were registered in their names, and that he traded in them as actively as he wished, without consulting the others.

At the time of his death Clemens Senior had only 2900 of the 3600-share block in his possession. I have referred to the 300 that he sold in 1933. The 2900 that he had left were represented by certificates nos. 9613 to 9641. Those are the certificates mentioned in paras. 7 and 7(a) of the statement of claim. The 400 shares represented by certificates nos. 9642 to 9645 were given by the father to his daughter Elizabeth in the hospital in Detroit just before he underwent his operation. At the same time he also gave her two share certificates, nos. 9646 and 9647, registered in the name of John C. Clemens. In other words, at that time, shortly before his death, he gave his daughter 600 shares of International Nickel. About that time he set up trust funds for his two sons, and I see nothing out of the ordinary in the fact that he gave his daughter 600 shares; it seems to me a reasonable thing to have done in view of the provision he was making for his sons. I have no hesitation in accepting the daughter's evidence as to the gift of those 600 shares. I have already held that the shares represented by certificates 9642 to 9645, registered in the name of John Joseph Clemens, were the father's property, and that he had the right to do with them as he wished. No question arises as to the 200 shares registered in the name of John C. Clemens

except that the plaintiff says the executors wrongfully gave them to Elizabeth. They did no such thing. These 600 shares, 400 registered John Joseph Clemens and 200 registered John C. Clemens, never came into the hands of the executors as such. They were sent up from Pennsylvania by the daughter to the Trusts and Guarantee Company Limited as her agent, with instructions to have them registered in her name. They were never in the possession of the executors as executors, and the executors never had any right to deal with them.

I wish to say something about the volume of evidence that has gone into this case. Subpoenas were issued to the managers of the Canadian Bank of Commerce and the Bank of Toronto to bring in all the cheques of John C. Clemens for the period from 1926 to 1943. The bank managers set a staff to work and found over 300 cheques in each bank that were put in as evidence. Little or no use has been made of those cheques. Apparently all that it was intended to prove by them was that the late Mr. Clemens did his business under the name of John C. Clemens, a fact that nobody disputed and that could have been proved by one statement made by either bank manager, or by any other person who was familiar with Mr. Clemens's affairs. The staffs of those two banks worked about 60 hours each preparing this material, to prove the obvious. It seems to me that this is a very irresponsible use of the power of subpoena and comes very close to an abuse of the process of the Court. A motion might well have been made on behalf of those two banks before the judge who was to preside at these sittings to have some disposition made of this exercise of the power of subpoena. It is at least reasonable that the person who was asked to go to all that trouble should know that what he is expected to prove will have some bearing on the outcome of the litigation, and the material that caused so much trouble had, as far as I can see, no bearing whatever on the litigation except to indicate what was obvious—that the father was known as John C. Clemens.

The action is dismissed with costs.

*Action dismissed with costs.*

17th November 1952. The appeal was heard by HENDERSON, LAIDLAW, HOPE, HOGG and AYLESWORTH JJ.A.

V. H. Little, for the plaintiff, appellant: We claim to be the owner of these shares, and to have been the owner from the time of registration; if our ownership did not arise in January 1929 we never did own them. [LAIDLAW J.A.: Your position is that if the father used these shares as John Joseph Clemens after 1929 he did so wrongfully?] Yes. The whole point is whether the father contemplated any change of ownership when he put these shares in his son's name. There is no doubt that he intended to give, and did give, shares to Elizabeth and Richard, his daughter and his other son, and my submission is that the shares registered in the name John Joseph Clemens were similarly intended as a gift to us. [LAIDLAW J.A.: Is there any evidence that the father used the name John Joseph Clemens after 25th January 1929?] No, except that in the will dated 1st January 1939 he described himself as "John Joseph Clemens, sometimes known as John C. Clemens".

I submit that the learned trial judge erred in finding that these shares were registered in the father's name. There is no evidence of any contemporaneous declaration by the father showing his intention. There is, however, also no evidence indicating that the son was to be trustee of these shares for his father. The presumption of advancement is particularly strong, since the son at that time was only 15 years old: *Sidmouth v. Sidmouth* (1840), 2 Beav. 447, 48 E.R. 1254; *Grey v. Grey* (1677), 1 Cas. in Ch. 296, 22 E.R. 809, 2 Swan. 594, 36 E.R. 742; *Murless et ux. v. Franklin et al.* (1818), 1 Swan. 13, 36 E.R. 278; *Crabb v. Crabb* (1834), 3 L.J. Ch. 181; *Dumper v. Dumper* (1862), 3 Giff. 583, 66 E.R. 540; *The Northern Canadian Trust Co. v. Smith*, 55 Man. R. 122, [1947] 1 W.W.R. 765, [1947] 3 D.L.R. 135; *Royal Trust Co. v. Eldridge*, [1923] 2 D.L.R. 689, [1923] 2 W.W.R. 67. [AYLESWORTH J.A.: There is no doubt about the law if you can persuade the Court to accept your view of the facts.]

H. F. Parkinson, Q.C., for the defendants, respondents: I concede that the plaintiff is entitled to succeed if it is found that the father intended to register the shares in the son's name and completed the gift. [LAIDLAW J.A.: If these certificates were in the son's name and the father used them as his own he would be guilty of conversion.] Yes. [LAIDLAW J.A.: Is there not a rule that the Court should avoid a finding that



involves the commission of a crime, if the facts are capable of another interpretation?] Yes.

The trial judge's findings are amply supported by the evidence, and should be accepted. The father always retained physical control of these certificates, which bear on their face a statement that the shares are transferable only on production of the certificate duly endorsed, until the execution of the trust agreement in 1942, when he handed over certificates for the shares affected by that agreement. In fact he made no effective gift of any of the shares until the execution of this agreement. Although shares of stock are incorporeal, the ordinary rules as to gifts of personal property are applicable to them: *Wegenast, Canadian Companies*, 1931, p. 531; 38 *Corpus Juris Secundum*, 1943, p. 786; 15 *Halsbury*, 2nd ed. 1934, p. 712; *Cochrane v. Moore* (1890), 25 Q.B.D. 57 at 75; *Allen-West Commission Co. v. Grumbles et ux.* (1904), 129 F. 287. There is no corroboration whatever of the evidence of a gift of the 3300 shares; much less is there corroboration by other material evidence, as required by s. 12 of The Evidence Act, R.S.O. 1950, c. 119.

*H. V. Little*, in reply.

*Cur. adv. vult.*

12th January 1953. HENDERSON J.A.:—An appeal from the judgment of Mr. Justice Judson, dated 1st May 1952, by which the plaintiff's action was dismissed with costs.

I agree with the findings and reasons of the learned trial judge.

It is clear that a finding in favour of the plaintiff involves a finding that his late father over a period of years was a thief and forger. When a member of the Court during the argument pointed this out, neither plaintiff nor his counsel, both present, made any disavowal of this fact.

I would dismiss the appeal with costs.

LIDLAW J.A. (*dissenting*):—The facts in this case have been stated by my brother Hogg in his reasons for judgment. The first question that presents itself to me for consideration and answer is this: Who was the registered owner of the shares of stock transferred by the appellant's father on 25th January 1929 to John Joseph Clemens? Was it the appellant's father, whose baptismal name was John Joseph Clemens, or was it the

appellant, who had the same name? If it was the appellant's father then it follows at once that the action and this appeal fail, but in my opinion the appellant's father intended to transfer, and he did in fact transfer, the shares to his son, the appellant. The appellant was the registered owner of them. I reach that conclusion from the following considerations: On that date, 25th January 1929, the family of the appellant's father consisted of himself, his wife, and his three infant children, Elizabeth Louise, then about 17 years of age, John Joseph, about 15 years of age, and Richard A., about 12 years of age. He was devoted to all of them. He had sufficient wealth to make provision during his lifetime for all of them. It was his intention to do so. He caused three blocks of shares of International Nickel Company of Canada Limited to be transferred and registered on the same day. One block was transferred to and registered in the name of John C. Clemens, which, although it was not his baptismal name, was the name used by him generally to identify himself, and which plainly distinguished him from his infant son, John Joseph. The second block of shares was transferred to and registered in the name of John Joseph Clemens, which distinguished the transferee from John C. Clemens, the transferee of the first-mentioned block of shares. The third block of shares was transferred to and registered in the name of his other infant son, Richard A. Clemens. There was no reason to prefer one son to the other or to discriminate between them, and the father did not do so. He intended to transfer an equal block of shares to each of his sons and he transferred a smaller broken block of 840 shares to himself. He had that block registered in the name John C. Clemens, that being the only name by which he was known to others in his extensive business transactions.

On the following day, 26th January, he transferred three more blocks of shares. He directed that one of those blocks be registered in the name of each of his sons, John Joseph and Richard A., and the third block in the name of his daughter Elizabeth Louise. At a later date he transferred a block of shares to his wife and had them registered in her name. It is my irresistible conclusion that the father intended to treat both of his sons alike so that after the transaction on 26th January each of them would be the registered owner of the same number of shares of International Nickel Company, namely, 4,600 shares.

I have considered also the evidence that in 1933 the appellant's father stated to F. G. Cushing, presently Master of the Supreme Court of Ontario, that there were shares held in the names of his three children, "that he had from time to time purchased shares in the names of his children, and that in so doing he was building up separate estates for them, putting stock in their names"; also that in a will executed on 7th November 1933 the appellant's father therein recorded the fact that he had invested in stocks and securities for each of his children and that such investments should be considered the separate property of each of them. I quote from para. 7(c) of that will as follows: "I have in the past invested and speculated with private funds of my children and have accumulated for each of them as their respective separate property certain stocks, bonds, cash and securities in varying amounts for each of them."

The fact that the appellant was the registered owner of the shares transferred by his father on 25th January to John Joseph Clemens does not necessarily lead to the conclusion that the appellant was the absolute owner of them. On the other hand, the fact that the appellant's father paid for the shares with his own money does not necessarily result in a trust in his favour. In such a case as this, where a father purchases property and causes the title of it to be put in the name of his son—and especially when the son is an infant—it is presumed that he intended the purchase to be an advancement for the benefit of his son. That presumption is rebuttable. It may be rebutted, (1) by evidence of acts or expressions of the father which are so closely connected with the transaction that they may properly be regarded by the Court as contemporaneous therewith, but evidence as to subsequent acts or expressions of the father is not admissible to rebut the presumption; (2) by evidence of acts or expressions of the child either contemporaneous with the transaction or subsequent thereto.

I refer to *Grey v. Grey* (1677), 1 Cas. in Ch. 296, 22 E.R. 809, 2 Swan. 594, 36 E.R. 742; *Mumma v. Mumma* (1687), 2 Vern. 19, 23 E.R. 622; *Taylor v. Taylor* (1737), 1 Atk. 386, 26 E.R. 247; *Stileman v. Ashdown* (1742), 2 Atk. 477, 26 E.R. 688; *Finch v. Finch* (1808), 15 Ves. 43, 33 E.R. 671; *Murless et ux. v. Franklin et al.* (1818), 1 Swan. 13, 36 E.R. 278; *Sidmouth*



*v. Sidmouth* (1840), 2 Beav. 447, 48 E.R. 1254; *Jeans v. Cooke* (1857), 24 Beav. 513, 53 E.R. 456; *Royal Trust Co. v. Eldridge*, [1923] 2 D.L.R. 689, [1923] 2 W.W.R. 67.

When it is alleged that the gift was not complete and that the child took the property as a trustee only for his parent, the onus of proof that the parent did not intend an advancement or gift for the benefit of his child rests upon the parent. The question whether or not that onus of proof has been discharged depends for an answer upon the evidence in each particular case but it is to be borne in mind that the presumption of advancement is not rebutted by evidence of slight circumstances: *Finch v. Finch*, *supra*. In the instant case it is my opinion that there is no evidence from which it can be reasonably found that the appellant's father did not intend to make a complete gift to the appellant of the 3,600 shares of stock transferred to and registered in his name on 25th January 1929. There is no evidence of any act or expression of the father or of the appellant contemporaneous with the transfer and there is no evidence of any subsequent act or expression of the appellant touching the question of the father's intention when he transferred the shares and directed that they be registered in the name of the appellant.

The only remaining way in which a claim that the appellant was a trustee of the shares for his father or that he is now a trustee for the representatives of his estate could be successfully established is by evidence showing to the satisfaction of the Court that the appellant surrendered his rights of complete ownership of the shares in question to his father or to the representatives of his father's estate and thereafter became merely a trustee of the shares. There is no evidence of any express declaration of trust by the appellant and there is no evidence of any express arrangement whereby he became a trustee of the shares. The Court should not imply such a trust and thus divest the appellant of his property rights unless the evidence as to what was done and said by the appellant leads irresistibly to that conclusion. I cannot say from the evidence that the appellant was willing to convert his absolute ownership of the shares into a trust in favour of his father or the personal representatives of his father's estate, or that he had any intention whatsoever so to do. He did not regard himself as a trustee and the evidence relied upon to establish that he became a trustee

of his own property for the benefit of his father or his father's estate is not of such quality or weight as to justify that finding.

I do not discuss all of the evidence at length. The facts that he knew in 1936 that his father had the share certificates in his possession, retained the dividends from the shares for himself and made income tax returns including such dividends as his own, are understandable and reasonably explained when one considers all of the circumstances. The contents of a letter dated 28th December 1939, purporting to be signed by the appellant and addressed to Bankers Trust Company, 14 Wall Street, New York, is far from satisfactory proof that the appellant considered himself to be a trustee of the shares in question. That letter was prepared, presumably, by one S. Brunton, who carried on correspondence with the Bankers Trust Company at the request of the appellant's father and "was endeavouring to straighten this thing out for Mr. Clemens at the time". Mr. Brunton could not recall specifically who gave him instructions to write the letter and the copy of it filed as an exhibit at the trial was produced from his file. Even if the appellant was the author of that letter I would not accept it as proof that the appellant was willing to forego or give up his ownership of the shares in favour of his father.

Finally, the evidence touching the creation of a trust under an agreement dated 31st December 1942, which included the block of 1,000 shares of International Nickel Company purchased by the appellant's father on 26th January 1929, does not disclose any intention by the appellant to accept that provision for him either in full or in part consideration for his rights to the lot of 3,600 shares of which he was the absolute owner. Nor was there anything done by the appellant in connection with the creation of that trust which can be taken as proof that he gave up that ownership and became a trustee only of those shares.

Thus, in my opinion, the claim by the appellant that he is the owner of the 3,300 shares of stock in question in the action has been established and the Court below should have granted the appellant the relief asked for by him in respect of those shares. I would direct that the judgment of the Court below be set aside and in place thereof judgment should be issued in favour of the plaintiff in proper form and in accordance with my opinion as stated, together with costs of the action.

This appeal should be allowed with costs, excepting, however, costs of preparation of the appeal book in two volumes. Those volumes came to the Court in such a deplorable state that it was almost impossible to use them. Therefore, I would not allow the appellant any costs for the preparation of them.

HOPE J.A. concurs with AYLESWORTH J.A.

HOGG J.A.:—This appeal is from a judgment pronounced on the 1st May 1952 by Mr. Justice Judson dismissing an action brought by the appellant against the respondents for a declaration that he was the owner of 3,300 shares of capital stock of International Nickel Company of Canada Limited, the certificates for which are in the possession of the respondents.

On the 25th January 1929, the appellant being then of the age of 15 years, his father caused to be registered in the name of John Joseph Clemens (which is the baptismal name both of the father of the appellant and of the appellant himself) 3,600 shares of said International Nickel Company stock and on this same day the appellant's father caused 840 shares of the same stock to be registered in the name of John C. Clemens. On the next day, 26th January 1929, the father of the appellant caused an additional 1,000 shares of the same stock to be registered in the name of John Joseph Clemens. There is evidence that the address with reference to these shares was first 1243 East Grand Boulevard, Detroit, Michigan, U.S.A., and later 1211 East Grand Boulevard in the same city. The certificates comprising these 1,000 shares were numbered 9704 to 9713 and were for 100 shares each. On the said 25th January the father caused 3,600 shares of the stock of the aforesaid company to be registered in the name of his son, Richard A. Clemens, and on the next day the appellant's father arranged to have 1,000 additional shares of the aforesaid company registered in the name of Richard and 1,200 shares registered in the name of his daughter Elizabeth Louise (afterwards Elizabeth Brown).

In no instance did the appellant furnish any of the funds by which the deceased acquired the shares which the appellant now claims as his own. The appellant claims that the aforesaid 4,600 shares of the stock of the International Nickel Company were registered in his name and were so registered with the intention on the part of his father to advance or benefit his son,



the appellant, but that certificates for 3,300 of the said shares are withheld from him by the respondents.

The issue which is presented to the Court is complicated by the fact that the father's real or baptismal name is the same as that of the appellant, namely John Joseph Clemens. The first question to be determined, therefore, is whether the father of the appellant registered the shares in question in his own name or whether they were registered in the appellant's name. The appellant's father died on the 31st January 1943, and it will be convenient, hereinafter, to refer to him as "the deceased".

The evidence establishes with certainty that throughout the greater part of the lifetime of the deceased, and in connection with almost all of his extensive business transactions, he was known as, and he used the name, "John C. Clemens".

The following circumstances are some of those appearing in the evidence adduced at the trial of the action: The succession duty affidavit and the schedules thereto show that at the time of his death the deceased was the owner of shares in various companies to the total value of \$182,581.50. Apart from the 2,900 shares of International Nickel stock stated in the affidavit to be registered in the name of John Joseph Clemens, there were 847 shares of this company and shares in some fifteen other companies registered in the name of John C. Clemens.

The deceased opened bank accounts in Sudbury, Ontario, in February 1924 and January 1931, in the name of John C. Clemens and drew numerous cheques upon those accounts in this name for his own purposes. The name John C. Clemens was used by the deceased in 1924 and 1934 in signing applications for life insurance upon the life of the appellant, who is referred to in these applications as John Joseph Clemens and J. J. Clemens, respectively. Certain cheques were put in evidence drawn in 1935 and 1936 by the deceased in the name of John C. Clemens, the cheques being in favour of the appellant. There is evidence that on several occasions transfers and deeds of conveyance of land were executed by the deceased, in some instances as vendor and in others as purchaser, in the name of John C. Clemens.

Several wills were drawn by the deceased, one of which is signed "John Casper Clemens", but all of the others are signed "John C. Clemens" and in several of them, the deceased described

himself as "John Joseph Clemens, sometimes known as John C. Clemens". His last will, which was dated 12th September 1942, is signed by the name John C. Clemens, and letters probate of this will, dated the 12th July 1943, are of the will of John C. Clemens.

Apart from business transactions the deceased was known and referred to as John C. Clemens. The appellant's sister, Elizabeth Louise Brown, testified that she knew her father by the name of John C. Clemens and her brother, the appellant, by the name of John Joseph Clemens. Furthermore, Mrs. Margaret Mary Kaiser, a sister of the deceased, testified that she had always known her brother by the name of John C. Clemens, and said that the initial "C" stood for the name "Casper".

The deceased was designated "John C. Clemens" in the certificate of his marriage in the year 1911 and he signed the application for the marriage licence in that name. The learned trial judge expressed the opinion during the course of the trial that "John Clemens Senior was known everywhere as John C. Clemens" and said that he was convinced of this fact.

There is evidence which shows that on one occasion prior to 1929 the deceased placed shares of stock in the name of John Joseph Clemens.

Viewing the matter in the light of subsequent transactions there is the possibility that the shares registered in the name John Joseph Clemens, even before the year 1929, were intended to be in the name of the appellant. Some support is given to the view that when the deceased caused shares of stock to be registered in the name of John Joseph Clemens he had in mind his son and not himself, by a certain passage in one of the several wills made by the deceased, in which the deceased stated he had accumulated for each of his children, as their own separate property, certain stocks, bonds, cash and securities.

A significant fact is that which I have already mentioned, namely, that on the day on which the deceased placed 3,600 shares of International Nickel stock in the name of John Joseph Clemens, he also caused to be registered 840 shares in the name of John C. Clemens, the name in which he was accustomed to carry on his business transactions.

The conclusion to which I have come is that the name John Joseph Clemens in which the shares of International Nickel

stock were registered by the deceased on the 25th and 26th January 1929 was the name of the appellant and not of his father.

The second problem which presents itself for solution is whether the presumption at law that the shares in question, registered on the 25th and 26th January 1929, were intended by the deceased to benefit and advance his son and were, therefore, the appellant's own shares, has been rebutted and whether, therefore, the appellant holds the shares, registered in his name, in trust for the personal representatives of the deceased.

It would, I think, be of assistance before discussing the facts relating to this aspect of the case, as they appear in evidence, to give some consideration to the principles to be applied to the matter under consideration.

As long ago as the 17th century it was established, and the rule of law has been affirmed in a long series of decisions, that when a father places property, purchased by himself, in the name of a child, the presumption is raised that the intention of the father was to advance or benefit his child and that no trust was created under which the child held the property for the father, and especially is this so when the child is an infant. It would seem that one of the earliest of such cases, and one that is referred to in many judgments of modern times, is *Grey v. Grey* (1677), 2 Swan. 594, 36 E.R. 742. Lord Nottingham, who delivered the judgment, referred to the case as "a very short one but of a very nice and curious debate". The facts, in brief, were that a father purchased land in the name of his son with his own money but received the profits therefrom for twenty years, made leases of the land, enclosed part in a park, built on part of it and directed a settlement to be drawn with respect to the land and treated for its sale. It was held that a presumption was raised that the father intended to advance and benefit his son and that "it is not reasonable that the father's perception of profits, or making leases, or doing such other acts as these, which the son, in good manners, does not contradict, should turn a presumptive advancement into a trust". In *Commissioner of Stamp Duties v. Byrnes et al.*, [1911] A.C. 386, Lord Macnaghten, who delivered the judgment of the Judicial Committee of the Privy Council, in referring to Lord Nottingham's judgment in *Grey v. Grey* said that it placed "a more



benignant and a more commonsense construction on similar transactions between father and son”.

A later case frequently mentioned is that of *Sidmouth v. Sidmouth* (1840), 2 Beav. 447, 48 E.R. 1254, where Lord Langdale M.R., after stating that the presumption might be rebutted by evidence manifesting an intention that the child should act as a trustee, said, “the only question is, whether there is such other evidence”. The fact that the father received the dividends during his life from securities purchased by him in the name of his son was not evidence to establish a trust in favour of the father.

In *Jeans v. Cooke* (1857), 24 Beav. 513, 53 E.R. 456, Sir John Romilly referred to the evidence necessary to rebut the presumption of an advancement in the following words: “The evidence ought to be contemporaneous, or nearly so, because subsequent acts or subsequent declarations by a father will not enable him to convert an advancement for his son into a beneficial purchase for himself. This principle, of course, does not apply to subsequent acts and declarations of the son, which may be used for the purpose of shewing that he considered himself only to be a trustee.”

The fact that a father, who had bought land and taken mortgages in the name of his son, continued to exercise control over them and receive the rents of the lands and the interest on the mortgages, was held not to rebut the presumption of an advancement in favour of the son in *Williams v. Williams* (1863), 32 Beav. 370, 55 E.R. 145.

I have already referred to the comparatively recent case of *Commissioner of Stamp Duties v. Byrnes et al.* There the facts before their Lordships of the Judicial Committee were that a testator bought properties in the names of his two sons and subsequently received the rents and paid for rates and repairs. It was held that the gifts passed the property to the sons exclusive of all interest in the father. The headnote states: “The receipt by the father of the rents did not operate to convert a presumptive advancement in favour of the sons into a trust in favour of the father.”

A recent case on the subject is that of *Royal Trust Co. v. Eldridge*, [1923] 2 D.L.R. 689, [1923] 2 W.W.R. 67, in the Supreme Court of Canada. It was there held that where a

father bought property in the name of his son, there was a presumption of gift because of the relationship of the parties, although the father for a number of years kept possession of the transfer of the land in his strong-box, cultivated the land as his own, then leased it and received the rents and profits from the property.

The principle of advancement has special significance where the child is an infant: *Lamplugh v. Lamplugh* (1709), 1 P. Wms. 111, 24 E.R. 316. This subject is dealt with in 17 Halsbury, 2nd ed. 1935, p. 677.

In my opinion, when the law established by the authorities I have mentioned is applied to the facts of this case, the presumption is raised that the shares of stock of the International Nickel Company placed in the name of the appellant by the deceased on the 25th and 26th January 1929 were for the advancement and benefit of his son, the appellant. The fact that at the time of the transaction in January 1929 the appellant was a boy of only 15 years of age confirms the application of the principle to the circumstances. The onus then rests on the respondents to rebut the presumption by evidence of sufficient weight to establish that a trust was created in favour of the deceased. As was said by Lord Langdale in *Sidmouth v. Sidmouth*, *supra*, "the only question is, whether there is such other evidence".

It is contended on behalf of the respondents that the fact that the father retained physical possession of the share certificates is evidence in rebuttal and is evidence that the shares were held in trust by the appellant for the deceased. But this contention is not supported by the authorities to which I have referred. Physical possession of the property placed by a father in the name of his son, and even use of such property by the father, as is shown by the cases, does not rebut the presumption of advancement. The judgment in *Royal Trust Co. v. Eldridge* clearly reaffirms this long-established proposition of law. Furthermore, the fact that the father kept the share certificates in a safety-deposit box held in the names of his sons and kept possession of the key to such box was not an unlikely thing for him to do if bonds and shares of stock in the box were property belonging to persons who were infants when the property was acquired.

Evidence on the part of the respondents to rebut the presumption of advancement must be of circumstances occurring at the same time as the original transaction. The presumption of advancement cannot be rebutted by acts done by the deceased long after the registration of the shares in question in the appellant's name. There is no declaration, nor is there any conduct on the part of the deceased subsequent to the 25th and 26th January 1929, so connected with the registration of the shares in question as to be contemporaneous and that would, therefore, be evidence in rebuttal of the presumption of law in the appellant's favour.

However, there are certain facts which appeared in evidence that are of much importance in deciding the issue as to whether they rebut the presumption of advancement and these facts consist of acts and declarations on the part of the appellant himself.

The appellant testified that in 1936, when he was 22 years of age, the deceased told him, in discussions about shares of stock, that he had purchased International Nickel stock for the appellant, and further testified that at various times he had an opportunity to examine the share certificates. His evidence on this point is as follows:

"Q. In your discussions with your father about the stock that he had purchased for you, was International Nickel Company stock mentioned? A. Yes.

"Q. And did he tell you how much had been purchased in the name of John Joseph Clemens of that stock? A. Yes, at various times I had an opportunity to examine the stock certificates. The earliest recollection I have is in the machine-shop over at the Sudbury Brewery. There was a vault there, and he showed me them, and he said they were my property, and that he was going to look after them for me, and I do not remember how many but there were in the neighbourhood of about between twenty and thirty different pieces of paper, and stating the International Nickel stock was registered in the name of John Joseph Clemens.

"Q. How many shares was each of these certificates? A. They were one hundred share certificates.

"Q. Did you ever have a group of share certificates in the name of John Joseph Clemens in your hands or in your possession? A. Yes, that was the first time I did have them in my hands—in the machine-shop at the Sudbury Brewery."



This incident happened about the year 1936. However, the appellant later said that it was not till about the time of his father's death, in 1943, that he learned from certain papers of his father's which came into his hands that 3,300 shares of the stock in question stood in his name. Shortly after his father's death, the appellant requested information from the executors of his father's will, and from other members of the family, regarding these shares, and his evidence on this matter is as follows:

"Well, as I explained, when I discovered there were 3,300 shares still outstanding in my name, I asked the Crown Trust Company about it, as well as the other members of my family, and I was convinced my father had disposed of them and possibly in favour of other stocks when I was presented with these income tax returns, and I let the matter drop. I thought my father had disposed of them, because I had given him a power of attorney."

The appellant also testified that he knew from income tax returns for the year 1941 that his father was paying income tax on dividends from 4,247 shares of International Nickel stock, while at the same time the appellant paid income tax on only 1,000 shares.

In December 1942, very shortly before his death, the deceased had a trust agreement prepared, by the terms of which 900 shares of International Nickel stock were placed in trust for the appellant. This agreement was signed by the appellant, who said he did not first read it, and who also said that the schedule setting out the shares which were the subject of the agreement was not attached thereto. It can hardly be conceived that this agreement did not contain a reference to the shares which were placed in trust by it. It was intended by the deceased that 1,000 shares, and not 900 shares, of International Nickel stock should be placed in trust for the appellant, and he later received the other 100 shares from the respondents. With reference to this trust agreement, the appellant testified that he thought his father was putting some of his own stock, or excess money, in the appellant's name. There is evidence that the 900 shares of International Nickel stock, to which the said trust agreement referred, were represented by nine certificates for 100 shares each, numbered 9705 to 9713. These certificates

were part of those for 1,000 shares placed in the name of the appellant on 26th January 1929.

On the 24th November 1939, Mr. S. R. Brunton, a chartered accountant, of Sudbury, acting apparently both for the respondents and the appellant, wrote to the Bankers Trust Company of New York City, U.S.A., to the effect that the shares of stock of International Nickel held by John Joseph Clemens of Sudbury, Ontario, were owned by John Joseph Clemens, Sr., but the stock in the name of John Joseph Clemens of 1211 East Grand Boulevard, Detroit, was owned by John Joseph Clemens, Jr. It was desired to change the appellant's address from the Detroit address to one in Sudbury. There was also placed in evidence a letter dated 28th December 1939, with reference to International Nickel shares, purporting to have been written by the appellant to the Bankers Trust Company of the City of New York. The letter reads as follows:

"I have been advised by Mr. S. R. Brunton, C.A. of Sudbury, that you feel it would be in order to affix the word Junior after my name in order that the dividends of the above company which have in the past been sent to 1211 East Grand Boulevard, Detroit and will in the future be sent to 209 College Street, Sudbury, Ontario, may be distinguished from those of my father.

"In order that I may forward the Stock Power and the required certificates to you would you be kind enough to advise me as to the number of certificates on which dividends have been sent to 1211 East Grand Boulevard, Detroit. On receiving this information I will endeavour to forward the required certificates immediately. My Father had a complete record of these certificates but unfortunately, it has been mislaid and we are unable to distinguish between his certificates and mine."

At the trial of the action the appellant denied that he had ever written this letter, but it is manifest that the learned trial judge did not accept this denial. The evidence shows that the address of the holder of the 1,000 shares placed in the name of the appellant by the deceased in 1929 was first 1243 East Grand Boulevard, Detroit, Michigan and was afterwards changed to 1211 East Grand Boulevard. It is apparent from this letter that although the appellant had been aware, since 1936, that certificates for many more shares of International Nickel stock stood in his name, nevertheless in 1939 he makes reference only to the 1,000 shares registered as of the Detroit address as

his own and the language of this letter implies that the remainder of shares registered in the name of John Joseph Clemens were owned by the deceased.

The appellant gave evidence that it was not until 1950 that he found that the 3,300 shares which had been registered in his name were included in the assets of the estate of the deceased. It is somewhat difficult to reconcile this testimony with the appellant's statement that shortly after his father's death he found that only 1,000 shares of International Nickel stock were listed in his name by the respondents.

All of this evidence of declarations and acts on the part of the appellant subsequent to the year 1929, when the shares of International Nickel stock claimed by the appellant were purchased by the deceased and placed in the appellant's name, must be given careful consideration for the purpose of deciding whether the appellant was the beneficial owner of the shares in question or whether he was a trustee for his father with respect to the said shares. It must be borne in mind that the learned trial judge did not accept some of the testimony given by the appellant at the trial. Upon the question of the credibility of a witness, this Court accepts the finding of a trial judge "unless there is some good and special reason to throw doubt upon the soundness of his conclusions": per Anglin J. (afterwards C.J.C.) in *Morrow v. The Ogilvie Flour Mills Company* (1918), 57 S.C.R. 403 at 411, 44 D.L.R. 557, quoting from the judgment of the Judicial Committee of the Privy Council in *Ruddy v. Toronto Eastern R.W. Co.* (1917), 38 O.L.R. 556, 33 D.L.R. 193, 21 C.R.C. 377. There are no such "good and special reasons" here.

In my opinion it must be concluded from the acts and declarations of the appellant that he did not consider himself the beneficial owner of the 3,300 shares in question, but considered himself only a trustee. Such being the case I find that the presumption of advancement has been rebutted and that the appellant is a trustee for the respondents of the 3,300 shares claimed by him in this action.

The appeal must be dismissed with costs.

AYLESWORTH J.A.: Plaintiff appeals from the dismissal by Judson J. on 1st May 1952 of his action against the estate of his late father wherein he asserts ownership of certain shares



of International Nickel Company of Canada Limited. Those shares at all relevant times were recorded in the name "John Joseph Clemens", which was the name of the deceased as well as that of the plaintiff. The facts are succinctly stated by the learned trial judge in his reasons for judgment and need not here be repeated. He found specifically, among other findings, that the father made no gift or advancement to the plaintiff of the shares in question and never parted with control of the shares.

I agree not only with the conclusions of the learned trial judge but also with his reasons for those conclusions. I desire, however, to state a further ground upon which in my view the appeal must fail. It is this: Even if a presumption did arise in favour of the advancement late in January 1929 from the father to the son of the shares in question, which I agree actually was not the situation, that presumption, I hold, was rebutted not only by the contemporaneous acts of the father in connection with these shares but also by the subsequent acts of the plaintiff himself over a period of years. The father, for example, purchased shares of International Nickel Company of Canada Limited in the name of "John Joseph Clemens" in December 1928, and no suggestion has ever been made that this purchase was for the benefit of the plaintiff; further, the time and the manner of endorsement of many of the certificates evidencing the purchases of stock in this company made by the father at times relevant to the determination of the issues in this action are of not inconsiderable significance as contemporaneous acts negating the presumption. Finally, the plaintiff, after he had attained his majority and with knowledge of the situation, stood by without protest, query or the making of a claim of any kind in assertion of his rights, if he had any, while the father held the share certificates, received the dividends, returned the dividends as his own income in his income tax returns, paid the income tax thereon and otherwise dealt with the shares and with the plaintiff in a manner only consistent with his (the father's) beneficial ownership and inconsistent with ownership as asserted at this late date by the son. The significance of the plaintiff's conduct is not lessened by the fact that during a considerable portion of this period, and as a result of differ-

ences which had arisen between them, the father and the son had drawn somewhat apart.

I would dismiss the appeal with costs.

*Appeal dismissed with costs, LAIDLAW J.A. dissenting.*

*Solicitor for the plaintiff, appellant: Vernon H. Little, Sudbury.*

*Solicitors for the defendants, respondents: Facer & Shea, Sudbury.*

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[COURT OF APPEAL.]

**Holland American Metal Corporation v. Goldblatt et al.**

*Contracts — Frustration — Change in Government Policy — Prohibited Exports.*

The defendants, dealers in scrap-metal in Ontario, agreed to sell to the plaintiff, an American company, a quantity of zinc ashes, to be shipped "within three months if possible". When the contract was made the export of zinc ashes from Canada was prohibited unless an export permit was first obtained, but the Government at that time granted permits freely. Before the expiration of the three months the policy of the Government was changed, and no permits were granted for the export of zinc ashes, except from the east or west coast of Canada.

*Held*, in these circumstances the performance of the contract at and after the date when the defendants were bound to perform it was frustrated by the action of the Government. The contract was in terms "subject to . . . government regulations", Government regulations had prevented its performance, and the defendants were thereby absolved from performing it. The fact that the defendants had not actually applied for an export permit to enable them to perform the contract was immaterial, since it was clear from the evidence that a permit would have been refused if it had been applied for. It was clearly in the contemplation of the parties that the material would be gathered in Ontario, and the defendants were not required to buy the material on either the west or the east coast in order to perform the contract.

AN APPEAL by the plaintiff from the judgment of Treleaven J., dismissing the action.

20th and 21st November 1952. The appeal was heard by ROACH, J. K. MACKAY and GIBSON JJ.A.

*F. S. Weatherston (G. N. Guyatt, with him)*, for the plaintiff, appellant: There was here a firm contract of sale, with an indefinite time of delivery. The words "if possible" in the confirmation of sale relate only to the time of delivery; they eliminate the implied term that time is of the essence of the contract and set a standard by which it can be determined what is a reasonable time for performance: *Hebb v. Mulock and New-*

*market Era and Express Limited*, [1945] O.R. 312, [1945] 2 D.L.R. 737, affirmed [1945] O.R. 727, [1946] 1 D.L.R. 81.

On the facts, there was no frustration. Since the defendants did not apply for an export permit, they cannot now say that it was impossible to obtain one, and they have therefore not shown that performance of the contract was rendered impossible. It is not sufficient to say that performance was a "business impossibility": *Brauer & Co. (Great Britain), Ltd. v. James Clark (British Materials), Ltd.*, [1952] 2 All E.R. 497.

Our corrections in the confirmation of sale did not constitute material alterations, since they did not alter the legal effect of the document to the prejudice of the defendants. In any event, our changes were impliedly accepted by the defendants, who continued correspondence without reference to or complaint about them. I rely on *Master et al. v. Miller* (1791), 4 Term Rep. 320 at 329, 100 E.R. 1042; *Suffell v. The Bank of England* (1882), 9 Q.B.D. 555; *Roberto v. Bumb*, [1943] O.R. 299 at 308, [1943] 2 D.L.R. 613; *In re Howgate and Osborn's Contract*, [1902] 1 Ch. 451; *Sommerville v. Rae* (1881), 28 Gr. 618; *Fitch v. Kelly et al.* (1879), 44 U.C.Q.B. 578.

Even if the alterations are deemed material, the only effect is that there is no written contract; there was still an oral agreement, with a sufficient note or memorandum in writing to satisfy s. 5 of The Sale of Goods Act, R.S.O. 1950, c. 345; *United States of America et al. v. Motor Trucks, Limited*, [1924] A.C. 196, [1923] 3 D.L.R. 674; *L. D. Turner, Ltd. v. R. S. Hatton (Bradford), Ltd.*, [1952] 1 All E.R. 1286; *Martin v. Haubner et al.* (1896), 26 S.C.R. 142. The fact that there was an alteration in the document does not prevent its being used as evidence: Smith's Leading Cases, 13th ed. 1929, vol. 1, p. 821; *Gould v. Coombs* (1845), 1 C.B. 543, 135 E.R. 653.

*J. D. Arnup, Q.C.*, for the defendants, respondents: The contract was frustrated because by competent legislative action the export of the product was forbidden. As a result of statutory interference, over which neither party had any control, the basis on which they contracted was destroyed, and consequently both parties are excused from performance: *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180 at 186; *Metropolitan Water Board v. Dick, Kerr and Company, Limited*, [1918] A.C. 119 at 127.



If there was a contract it was rendered void by the alterations made by the plaintiff in the written document, which alterations were never assented to by us. These were material alterations, affecting the rights of the parties, and had the effect of avoiding the contract: *Mason v. Burrows et al.* (1878), 29 U.C.C.P. 138 at 147; *Roberto v. Bumb, supra*; 4 C.E.D. (Ont.), 2nd ed. 1950, p. 59; Leake on Contracts, 7th ed. 1921, p. 605.

Our position throughout has been that we undertook no firm commitment to deliver, but only agreed to do so "if possible". Not only did the plaintiff fail to show that it was possible, but the evidence demonstrated that it was not possible.

*S. Paikin*, for the defendants, respondents: If there was a breach of contract, the plaintiff took no steps to mitigate the damages. If damages are awarded they should not be based on the foreign price, as the plaintiff claims, but on the difference between the contract-price and the market-price at the place of delivery and at the time of the breach: *Brenner v. Consumers Metal Co.* (1917), 41 O.L.R. 534 at 539, 41 D.L.R. 339.

*F. S. Weatherston*, in reply: It was within the contemplation of the parties that the product would eventually be sold abroad. There is no evidence that we failed to take steps to mitigate our damages.

There was no frustration since the defendants had zinc ashes at the east coast of Canada, for which an export permit might have been obtained. In any event, the defendants should have apportioned the available supply to their different buyers: *Bonner-Worth Co. v. Geddes Brothers* (1921), 50 O.L.R. 196, 64 D.L.R. 157.

As to the alterations in the contract, I refer to *Sullivan v. Constable* (1932), 48 T.L.R. 369; *Commonwealth Drilling Company Limited v. Community Petroleums Limited*, 2 W.W.R. (N.S.) 449, [1951] 4 D.L.R. 328.

*Cur. adv. vult.*

13th January 1953. The judgment of the Court was delivered by

ROACH J.A.: This is an appeal by the plaintiff from the judgment pronounced by Treleaven J. dated the 25th March 1952, after trial by him without a jury. By that judgment the action was dismissed with costs.

The learned trial judge gave no reasons. He stated simply that he found that the plaintiff had failed to establish its claim on the issues raised in the pleadings. The issues raised by the pleadings are as follows:

In its statement of claim the plaintiff alleged:

(1) That by an agreement in writing dated the 9th February 1951 it was agreed between the plaintiff and the defendants that the defendants would sell to the plaintiff approximately 50 net tons of galvanizers zinc ashes at the price therein mentioned and that shipment thereof would be made within three months if possible.

(2) That the defendants had failed to ship the said zinc ashes or otherwise deliver them to the plaintiff.

(3) That the plaintiff had thereby suffered damages.

(4) That by way of damages it claimed the sum of \$10,000.

In their statement of defence the defendants plead as follows:

(1) They admit that on or about 7th February 1951 they gave a written confirmation of the sale to the plaintiff but state that the plaintiff returned the confirmation, materially altered; that they did not agree to the alteration and therefore there is no existing agreement between the parties.

(2) In the alternative, they plead that the agreement, if one exists, is subject to the condition that the zinc ashes were to be shipped "within three months if possible"; that it has been impossible to ship them because, (a) the defendants had heavy prior commitments; (b) an embargo had been placed by the Government of Canada on the export from Canada of zinc ashes and the contract was therefore frustrated.

What actually occurred was as follows:

On 7th February 1951 the plaintiff's representative met with the representative of the defendants in the city of Hamilton and with the authority and on behalf of the plaintiff entered into an oral agreement with the defendants. That same day the defendants sent the plaintiff, in duplicate, a written "Confirmation of Sale". That written confirmation identifies the contract as "Order No. 1116", is addressed to the plaintiff, and otherwise is as follows:

"We confirm having this day sold you approximately 50 Net Tons of Galvanizers Zinc Ashes \$206.20 per Net Ton of 2000 lbs., U.S. funds.

"The above price is based on a zinc content of 70%. For each 1% zinc above 70% the price to be increased by three dollars and seventy-five cents (\$3.75) per short ton; for each 1% zinc below 70%, the price to be decreased by three dollars and seventy-five cents (\$3.75) per short ton; fractions in proportion.

"Shipment—within 3 months if possible. F.O.B. New York, N. Y.

"Tolerances: Chlorine plus sulphur tolerated up to 2%; over 2% and up to 4% will be deducted from the zinc content; above 4% will be double deducted from the zinc content.

"Special Conditions and Instructions: Weighing, Sampling and Assaying to be done in the usual manner \* at Buyer's European plant whose results are final in settlement. Seller has the right to be represented at his own expense.

"Payment: 80% of the approximate value against Seller's invoice, ocean bills of lading and weight list; balance after the exact weight and analysis are ascertained \* at the European receiving plant.

"Please sign one portion of this order and return same for our files.

"This contract is subject to strikes, riots, accidents, civic commotion, delay in transportation, government regulations . . . or any other circumstances beyond our control. . . ."

The asterisks were not in the confirmation when the defendants sent it to the plaintiff. I shall explain them in a moment.

That confirmation was accompanied by a covering letter addressed to the plaintiff signed by the defendants per Marvin E. Goldblatt and reading as follows:

"Pursuant to conversation had while in the writer's office this morning.

"We are pleased to attach hereto our sale contract covering the approximate 50 Net Tons of Galvanizers Zinc Ashes.

"Thanking you for this business, we remain."

When that written confirmation was received by the plaintiff it amended the same by inserting asterisks at the two points where I have shown them and a third asterisk at the bottom of the confirmation and opposite the third asterisk typing the words "at port of New York or at destination plant".



Having thus amended it, the plaintiff signed its acceptance in the place indicated on one of the duplicates and returned it to the defendant with a covering letter reading in part as follows:

“ . . . A copy is returned herewith, duly signed and you will please note that we have amended the weighing and payment clauses slightly.

“We . . . hope that further business in this line can be developed between our two firms. As soon as you are in a position to offer additional quantities to us, we would appreciate your getting in touch with us. Also kindly let us know as soon as possible the approximate date of shipment of the 50 ton lot.

“With thanks for this initial business. . . .”

It is the foregoing amendments or alterations that the defendants plead constitute material changes which they, the defendants, “have never accepted, adopted, confirmed or ratified” and as a result of which the defendants plead that there is no agreement existing between the parties.

In considering that plea, it is important to consider what the defendants did or said subsequently.

Having received the confirmation thus amended, the defendants immediately wrote to the plaintiff, under date of 16th February, and this is all that they said in that letter:

“Re: Our Sales Order No. 1116, 50 tons Zinc Ashes.

“Please bear in mind that we are not guaranteeing delivery of this material due to the fact that we have sold far ahead, but we will see what could be done.”

It is to be noted that there is no objection in that letter to the amendments.

Under date 30th March, the plaintiff wrote the defendant in part as follows:

“Re: Our Contract 1596 [That was the number which the plaintiff had assigned to the contract] . . .

“We refer to our above captioned contract with you for shipment within three months of 50 tons of Zinc skimmings.

“Kindly advise us as soon as possible when you expect to make shipment of this material. . . .

“As you know, we are interested in additional purchases and would appreciate any further offers you may be able to make during the next two months.”

To that letter the defendant replied by a letter dated 2nd April 1951, reading in part as follows:

"Referring to your letter of March 30th having reference to your contract No. 1596, 50 tons of Zinc Skimmings.

"If this material is available, we would get together with you providing the price was right, etc.; but in view of the fact that we are short on our original order and our plant production has fallen down, we are behind in our fulfillment of approximately two months.

"However, you may rest assured, that, should there be any change, we will definitely contact you."

The letter from the defendant to the plaintiff dated 16th February by implication amounted to an approval and acceptance by the defendant of the contract as amended by the plaintiff. The letter of 2nd April constituted express approval and acceptance. Note the reference to "your contract" and the statement "we are short on our original order". That is language entirely inconsistent with the defendants' plea that there was no contract because they had "never accepted, adopted, confirmed or ratified" the amendments.

There was subsequent correspondence between the parties. It will suffice to say on my consideration of the defendants' plea of *non consensus* that in none of the correspondence emanating from the defendants is there even a hint of any objection by them to the amendments.

The plea of *non consensus* fails. There was a contract in writing between the parties and that contract is the "confirmation of sale" as amended by the plaintiff.

The next plea of the defendants involves the interpretation of that contract. What effect should be given to the words "within three months if possible"?

The defendants now contend that those words constitute a condition that goes to the very root of the contract; that if within the three-month period they should find it impossible to fill the order then that circumstance would extinguish their liability under the contract.

Those words, in my opinion, cannot reasonably be thus construed. This was a firm contract and the only conditions to which it was subject are those set out in terms toward the end of the confirmation, *viz.*, strikes, riots, etc. The words "within

three months if possible" relate only to the date of shipment. The plaintiff could not require shipment as a matter of right before the expiration of three months. To give effect to the defendants' contention would transform this contract into something in the nature of an option. The context in which the words appear indicates their meaning and the scope of their application. It would be doing violence to the contract to extend their application beyond that which the context plainly indicates the parties intended they should have.

I turn now to the plea of frustration.

Section 5 of The Export and Import Permits Act, 1947, 11 Geo. VI (Can.), c. 17, as re-enacted by 1948, 11-12 Geo. VI, c. 16, s. 2, provides that:

"No person shall export or attempt to export from Canada any goods included in a list established pursuant to subsection one of section three of this Act, or any goods to a country named in a list established pursuant to subsection two of such section except under the authority of and in accordance with a permit issued under this Act."

Section 3(1) authorizes the Governor in council to establish a list of goods to which s. 5 of the Act shall apply, and s. 3(2), as enacted in 1948, authorizes the Governor in council to establish a list of countries to which s. 5 shall apply.

Pursuant to the authority of that Act a list of goods was established by P.C. 4638, dated 25th September 1950 ([1950] S.O.R. 1302), which included "zinc slabs, pigs, blocks, spelter and scrap" as the list of goods to which s. 5 of the Act should apply on exports to all destinations. P.C. 458, passed under the authority of that Act under date 27th January 1951 ([1951] S.O.R. 154), revoked the list established by P.C. 4638 and established a new list which included "zinc ores, concentrates, . . . and scrap" as the list of goods to which s. 5 of the Act should apply on exports to all destinations.

It is agreed that galvanizers zinc ashes are included in both those lists. Therefore at the date of the contract here in question, and at all relevant times subsequent thereto, the product involved in this contract could not be exported from Canada until an export permit was first obtained.

Both parties to the contract knew the export regulations covering the product at the date of the contract and it is clear



from the evidence that they entered into the contract on the basis that an export permit would be available.

At the trial the defendants called as a witness Arnold M. Tedford, an employee of the Government of Canada, who was in charge of export controls. He testified that the Government, through its Department of Trade and Commerce, granted permits for the export of zinc ashes freely up until about the end of March 1951. Commencing on 1st April 1951 there was a change in Government policy. A new plant was being established in central Canada for the processing of zinc ashes and other products having zinc content. From 1st April until about 24th May the Government imposed a complete embargo on the export of zinc ashes, including both low and high grade galvanizers. There was one exception to that embargo; the Government did not apply it to material on the east and west coasts. It was thought that those areas were too far removed from the new Canadian plant to supply it with galvanizers zinc ashes. Commencing about 24th May the Government relaxed its policy and thereafter permitted the export of zinc ashes having a chlorine content exceeding 3 per cent., but continued the embargo on zinc ashes having a chlorine content of 3 per cent. or less. That policy remained in effect until the trial of this action at least.

Even with respect to the intended export of zinc ashes having a chlorine content in excess of 3 per cent. the Government would not consider an application for an export permit unless the name of the consignee and the ultimate destination and the description of the material and the quantity were first disclosed to it.

It will be recalled that under the terms of the contract the plaintiff was not entitled as a matter of right to have the zinc ashes delivered until after the expiration of three months. That period would expire on 7th May. The embargo had been imposed on 1st April.

It will also be recalled that the contract provided for certain tolerances as follows: "Chlorine plus sulphur tolerated up to 2%; over 2% and up to 4% will be deducted from the zinc content; above 4% will be double deducted from the zinc content."

It was not in the contemplation of the parties that the chlorine content would be uniform in all the zinc ashes to be

shipped under the contract. There would be variations. It is clear from the evidence of Deane, the plaintiff's representative who negotiated the contract, that it was in his contemplation, at least, that the chlorine content in any one shipment, taken as a whole, would be no greater than 2 per cent. I have pointed out that after 1st May Government policy forbade the export of zinc ashes having a chlorine content of 3 per cent. or less. Therefore the performance of this contract after the date when the defendants were obligated by its terms to perform it was frustrated by the action of the Government.

Indeed the contract states in terms that it is subject to "Government regulations". Government regulations have prevented its performance and the defendants are thereby absolved from performing it.

It was argued on behalf of the plaintiff that the defendants could not now be heard to say that they could not obtain an export permit because they had not, in fact, applied for an export permit covering the export of the zinc ashes covered by the contract. It is a fact that they did not make a special application for an export permit for the export of this material. They had, in fact, applied for export permits covering export of similar material and these applications had been refused. Their failure to apply for a permit for the export of this particular material can make no difference in the result. The evidence is clear that if they had applied for it, it would not have been granted.

It was suggested by counsel for the plaintiff, although not strongly urged, that the defendants might have filled the order covered by the contract by purchasing the material in the eastern or western part of Canada, where the embargo was not in operation. It is a fact which was known to the plaintiff that the defendants, who are scrap-metal dealers, carry on the business in Ontario. It was never in the contemplation of the parties that this order would be filled by material originating on either the east or the west coast. Indeed, it has not been shown in the evidence that material of this type was available at any time on either the east or the west coast. It was in the contemplation of the parties that this material would be gathered in Ontario. To the knowledge of the plaintiff, the sale-price was fixed on that basis. The embargo having prohibited the export of

material from Ontario, and that being the place in which in the contemplation of both parties this product would originate, the defendants were not obligated to go as far afield as the east or the west coast of Canada for the purpose of filling the order.

For the reason aforesaid this appeal must be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Griffin, Parker & Weatherston, Hamilton.*

*Solicitors for the defendants, respondents: White & Paikin, Hamilton.*

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[COURT OF APPEAL.]

**Ottawa Public School Board v. The City of Ottawa.**

*Taxation — Municipal Real Property Assessment — Exemptions — Grant from Government of Canada “in lieu of taxes” — Distribution of Moneys — The Assessment Act, R.S.O. 1950, c. 24, s. 236.*

When s. 236 of The Assessment Act of 1950 (since repealed) spoke of “real property . . . by this or any other Act exempt or partly exempt from taxation under this Act” it must be taken to have referred to land that the Legislature of Ontario could make liable for taxation. Since s. 125 of The British North America Act prevents the imposition by the Legislature of a Province of taxes on property owned by the Crown in the right of Canada (*Smith v. Council of the Rural Municipality of Vermillion Hills*, [1916] 2 A.C. 569, applied), and the Province has no jurisdiction to deal with the prerogatives of the Crown in the right of Canada (*The King v. Lithwick* (1921), 20 Ex. C.R. 293; *Re Adams Shoe Co. Ltd.* (1923), 54 O.L.R. 625, applied), it must follow that s. 236 had no application to lands owned by the federal Crown, which is exempt from taxation, not under The Assessment Act or any other Act, but by virtue of an ancient principle of the common law. Section 236 therefore had no application to a grant received by a municipality from the Government of Canada, since, even if that grant was expressly made “in lieu of taxes”, it was not “in lieu of the taxes which would otherwise be payable”.

AN APPEAL by the plaintiff from the judgment of Aylen J., [1952] O.W.N. 585, dismissing the action.

21st November 1952. The appeal was heard by ROACH, J. K. MACKAY and GIBSON JJ.A.

*D. K. MacTavish, Q.C. (E. P. Newcombe, with him)*, for the plaintiff, appellant: The plaintiff is clearly one of the bodies for which the defendant's council is required by law to levy rates, and it is further a body to which taxes on property owned by the Crown would have been applied if that property had not



been exempt from taxation. The normal course of assessment is that a ratepayer is assessed for public school purposes, and before any departure is made from this mode of assessment the ratepayer in question must avail himself of the statutory privilege accorded to Roman Catholics. In the case of the Crown the normal course must be followed, since Her Majesty is, and His late Majesty was, a Protestant, and could not qualify as a separate school supporter if subject to assessment. Under The Act of Settlement, 1700 (Eng.), c. 2, it is impossible for Her Majesty to make such a declaration as will qualify her as a separate school supporter. I refer to *Windsor Education Board v. Ford Motor Company of Canada, Limited et al.*, [1941] A.C. 453, [1941] 3 All E.R. 241, [1941] 3 D.L.R. 721; *Dillon v. Toronto Millstock Company Limited and Dobson*, [1943] S.C.R. 268, [1943] 2 D.L.R. 797; The Public Schools Act, R.S.O. 1950, c. 316; The Separate Schools Act, R.S.O. 1950, c. 356.

The express exemption granted by s. 4 of The Assessment Act, R.S.O. 1950, c. 24, replaces any common law prerogative of the Crown: *Re Levying of Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208, [1943] 2 D.L.R. 481; *Attorney General v. De Keyser's Royal Hotel, Limited*, [1920] A.C. 508. If I am not entitled to rely on s. 4 of The Assessment Act, I rely on s. 125 of The British North America Act, 1867. In either case, the Crown is clearly exempt by virtue of The Assessment Act or another Act, and consequently s. 236 of The Assessment Act, as it was in 1950, applied to this grant.

*G. C. Medcalf, Q.C.*, for the defendant, respondent: A taxing statute must be strictly construed, especially where a gain by one group would involve a loss to another group in the community: *The Commissioners for Special Purposes of the Income Tax v. Pemsell*, [1891] A.C. 531.

Section 236 of The Assessment Act (since repealed by 1951, c. 4, s. 13) did not apply to a grant received from the Crown because the Crown is not exempt from taxation by The Assessment Act or any other Act, within the meaning of that section. The Crown is immune from taxation by constitutional right, apart from any statutory provision: Manning, *Assessment and Rating*, 3rd ed. 1951, p. 185; *Jennings v. The Township of Whitby*, [1943] O.W.N. 170.

If any school board in Ottawa was entitled under s. 236 it could only be the plaintiff, and not the separate school board, because there is no available procedure by which the Crown could be a separate school supporter: The Public Schools Act, s. 3; The Separate Schools Act, ss. 61, 62, 63, 67. The Legislature cannot be taken to have intended s. 236 to apply to a grant from the Crown, since such an application would lead to the doing of an injustice to separate school supporters: Maxwell on the Interpretation of Statutes, 9th ed. 1946, p. 207.

Even if s. 236 could in any circumstances apply to a grant from the Crown, it would only apply to a grant "in lieu of taxes", i.e., all the taxes, that would otherwise be payable. "In lieu of" imports total substitution: *The Atlas Construction Co. Ltd. et al. v. The City of Saint John* (1931), 4 M.P.R. 100.

*D. K. MacTavish, Q.C.*, in reply: The fact that the application of s. 236 may lead to injustice in respect of one group in the community is irrelevant, since there is no ambiguity in the section.

*Cur. adv. vult.*

14th January 1953. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the plaintiff from the judgment pronounced by Aylen J., dated the 4th June 1952. The action was tried without a jury and by that judgment the action was dismissed with costs.

The plaintiff's claim was to recover from the defendant the sum of \$183,720.63 being a portion of certain moneys paid to the defendant by the Government of Canada in 1950.

By The Appropriation Act No. 7, 1949, 13 Geo. VI (Can.), c. 42, Vote No. 938, certain moneys were authorized to be expended by the Government to provide for administration of the programme respecting grants to municipalities in lieu of taxes on Crown property.

By order of the Governor-General in Council, P.C. 741, passed on the 17th February 1950, regulations were made and established covering the payment of grants to municipalities in lieu of taxes on Crown property out of the moneys authorized to be expended as aforesaid under The Appropriation Act. Those regulations established a formula for the ascertainment of the

amount of any grants to be paid thereunder and authorized the Minister of Finance, subject to those regulations and pursuant to application by any municipality in a form prescribed by the Minister, to make a grant to that municipality in respect of federal property.

The City of Ottawa made an application as prescribed by the regulations and received from the Minister of Finance a grant of \$962,392.

Section 236 (since repealed) of The Assessment Act, R.S.O. 1950, c. 24, provided as follows:

“(1) Where any person or real property is by this or any other Act exempt or partly exempt from taxation under this Act and a grant in lieu of the taxes which would otherwise be payable is made to the municipal corporation in any year, the amount of such grant shall be distributed by the council to each of the bodies for which the council is required by law to levy rates in such year in the same proportion as the levy of each such bodies bears to the total levy.

“(2) In this section the bodies to share in the distribution shall be the bodies to which the taxes of such person or real property would have been applied if such person or real property had not been exempt or partly exempt.”

Unquestionably the plaintiff is a body for which the council of the defendant corporation is required by law to levy rates.

In the year 1950 the council of the defendant corporation at the request of the plaintiff did levy rates designed to raise the total sum required by the plaintiff in that year, and in fact did pay to the plaintiff the amount collected pursuant to that levy.

Notwithstanding that the plaintiff has already received from the defendant corporation the moneys thus collected, it invokes s. 236 of The Assessment Act above quoted and in this action pleads that the total levy for the City of Ottawa in the year 1950 was \$9,636,932.60 and that the total public school levy for that year was \$1,840,533.17 which is 19.09 per cent. of the total City tax levy. The plaintiff therefore claims 19.09 per cent. of the total amount paid to the defendant by the Government of Canada, namely, \$183,720.63.

Section 4 of The Assessment Act provides as follows: “All real property in Ontario shall be liable to taxation, subject to the following exemptions. . . .” Among the exemptions are: “Lands or property belonging to Canada or any Province.”



There is an ancient principle that the Crown is immune to taxation. That is not to say that the Crown cannot waive that immunity and tax itself. In *The Mayor, etc., of Weymouth v. Nugent* (1865), 11 L.T. 672, Cockburn C.J., dealing with the Crown's immunity, said this:

"There is a great principle or rule which, from an ancient period, has obtained, with regard to the prerogatives of the Crown: namely, that except with reference to certain matters of a public character the Crown is not bound by statute unless specifically mentioned therein. It may be said that the *status* of immunity from toll or dues arose in a remote time, when the right to impose such was founded upon a grant from the Crown, and that the Crown, in such case, never intended to tax itself, and therefore it may well be assumed that, whether tolls and dues have been taken by grant from the Crown or by statute, the Crown never intended to include itself."

Plainly, without the exemption in s. 4 of The Assessment Act, previously quoted, lands vested in either the provincial Crown or the federal Crown would not be liable to taxation because, if we omit the exemption in the statute, the Crown is not specifically mentioned.

Let us assume, without so deciding, on a proper construction that it should be held that the Legislature intended, by specifically enacting the exemption, that the words "all real property in Ontario" should include Crown property, and in that way the Crown or lands vested in the Crown are specifically referred to. On that construction, provincial Crown lands would be exempt only by virtue of the statute and not by virtue of the Crown's inherent immunity. Section 236 would then apply to the provincial Crown or lands vested in the provincial Crown.

Such a construction, however, would not enable s. 236 to be applied to the federal Crown or lands vested in the federal Crown, because s. 125 of The British North America Act prevents the imposition by any provincial Legislature of taxes on property owned by the federal Crown: *Smith v. Council of the Rural Municipality of Vermillion Hills*, [1916] 2 A.C. 569, 30 D.L.R. 83, [1917] 1 W.W.R. 108. The Province has no jurisdiction to deal with the prerogative of the Crown in the right of the Dominion: *The King v. Lithwick et al.* (1921), 20 Ex. C.R. 293, 57 D.L.R. 1; *Re Adams Shoe Co. Ltd.*, 54 O.L.R. 625, [1923] 4 D.L.R. 927, 4 C.B.R. 375.

When s. 236 of The Assessment Act refers to real property which is by that or any other Act exempt or partly exempt from taxation under that Act, that can only mean real property which the Legislature of the Province, acting within its legislative jurisdiction, could make liable for taxation.

The grant by the Government of Canada to the defendant corporation was, as I have already made clear, "a grant in lieu of taxes", but it was not "a grant in lieu of the taxes which would otherwise be payable", for the reason that the provincial Legislature lacks jurisdiction to make federal Crown lands liable to taxation.

For these reasons the appeal should therefore be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.*

*Solicitor for the defendant, respondent: G. C. Medcalf, Ottawa.*

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[JUDSON J.]

### Melnychuk et al. v. Susko et al.

*Churches — Formation of Congregation and Appointment of Trustees — Property originally Conveyed to Trustees for Unincorporated Association — Subsequent Erection and Consecration of Church — Invalid Proceedings under The Religious Institutions Act, R.S.O. 1950, c. 338, s. 13.*

*Trusts — Validity — Conveyance to Trustees for Unincorporated Association — Subsequent Erection and Consecration of Church, and Attempt to Appoint Trustees for Congregation — The Religious Institutions Act, R.S.O. 1950, c. 338, s. 13.*

Land was conveyed to seven trustees for an unincorporated, non-charitable association. Subsequently a church was built and consecrated on the land, the cost being borne almost entirely by the congregation (the membership of which, in origin, was practically identical with that of the association). The congregation held a meeting, in attempted compliance with s. 13 of The Religious Institutions Act, at which it purported to appoint trustees of the congregation. This meeting, however, was invalid because of non-compliance with the statutory requirements. A dispute as to the beneficial ownership of the church building arose between the association and the congregation.

*Held*, on all the evidence the proper conclusion was that the seven original trustees now held the land as trustees for the congregation, and there was nothing to prevent the congregation from now complying with s. 13 of the Act.

AN ACTION for an injunction and other relief.

26th and 27th November 1952. The action was tried by JUDSON J. without a jury at Milton.

*W. E. Horkins*, for the plaintiffs.

*D. D. Stokal*, for the defendants.

19th January 1953. JUDSON J.:—On 28th March 1948 a Ukrainian association in Nelson Township held a meeting and decided to purchase a lot on which to erect a building. This association was referred to throughout these proceedings as "the Prosvita", and I shall use this name to describe it. The minutes of the meeting (ex. 11) show that there was some discussion of a church. The lot was purchased from Joseph Kerry and his wife. Title was taken in the name of seven persons as trustees for the Canadian Ukrainian Society of Nelson Township (ex. 1). This is another name for the Prosvita. The date of the conveyance is 30th April 1948. The Prosvita paid for the lot (exs. 24 and 25). The trustees gave a mortgage of the property to Annie Babion for \$2,000 to enable the building to be erected. The mortgage is dated 9th April 1949. The money was deposited in the Prosvita's bank account. Peter Babion was employed to erect the building and the accounts for builders' supplies were paid out of the bank account (exs. 27-49). The minutes of the meeting of the Prosvita held on 18th December 1949 (ex. 12) show that the Prosvita had paid the building accounts and that it recognized the debt to Mrs. Babion of \$2,000 as its debt.

Mr. and Mrs. Babion, who were two of the main promoters of the building, are very emphatic that the building was to be for church purposes. Mrs. Babion says that she would not have lent the \$2,000 if this had not been clearly understood between her and the trustees. Babion worked according to a rough sketch (ex. 2) which shows that the building was to be for a church. Kerry, the vendor of the lot, also understood this and for this reason reduced the price of the lot. He says he also understood that the building was to be used as a hall for the social and educational objects of the Prosvita. The building permit (ex. 3) was issued to the Canadian Ukrainian Society and indicates that the building was to be a church. On 28th August 1949 the corner-stone was laid and the building was consecrated as The Ukrainian Orthodox Church of St. Michael. The ceremony was attended by several hundred people and the



leading dignitaries of the church were present. I have no doubt that all persons interested in this action knew that the building was to be so consecrated. Nevertheless the title to the building remained in the seven trustees.

On 18th April 1950 the congregation purported to hold a meeting pursuant to s. 13 of The Religious Institutions Act, R.S.O. 1950, c. 338. Nine people signed the minutes and are supposed to have been at the meeting but it is clear that Mr. and Mrs. Babion were not at the meeting but signed the minutes afterwards. Moreover the meeting was not properly summoned according to s. 13. The meeting, such as it was, appointed Susko, Wasylyk and Barylo trustees of the congregation. These were three of the seven trustees under the deed of conveyance (ex. 1). The meeting passed resolutions that the congregation should join the Ukrainian Greek Orthodox Church of Canada and that all property real and personal belonging to the congregation "shall be held in the name of the trustees for the use and benefit of its members as a component part of the said Ukrainian Greek Orthodox Church of Canada". The meeting also directed that the trustees file a copy of the resolutions in the Land Titles Office (ex. 5).

The purpose of this meeting is obvious. The minutes assume that the land held by the seven trustees for the Prosvita (ex. 1) is land which is held for the congregation and pursuant to s. 13 the meeting appoints trustees for the congregation. Four of the people who sign these minutes are trustees under the deed of conveyance (ex. 1), one of them being the defendant Susko.

On 17th December 1950 the congregation of the church held its next meeting. The minutes (ex. 10) say that the congregation has been in existence for some time without an executive. An executive was elected at this meeting. A meeting of the Prosvita held on 3rd January 1951, indicates that trouble was beginning and that a cleavage was developing between the Prosvita and the congregation (ex. 19). I have not the slightest doubt that up to this time the Prosvita and the congregation regarded themselves as bodies having identical interests and that the congregation was the religious expression of the Prosvita's activities. Everybody, including the seven trustees of the land, understood that a church was to be built and had been built and consecrated and that the church hall would also be used for the secular activities of the Prosvita.

On 15th January, Melnychuk, one of the plaintiffs, was removed as treasurer of the Prosvita. On 4th March 1951 a new executive was elected for the congregation (ex. 26). The defendant Susko was a member of this new executive. The trouble came to a head at the meeting of the congregation on 2nd December 1951, when Susko and others stated that the building had been erected for the Prosvita and not for the church. This faction withdrew from the meeting. The congregation then elected a new executive (ex. 20).

The faction led by Susko asserted that they had the right to use the building for their own purposes or those of the Prosvita. The congregation insisted that the building be used subject to the direction of its executive. The congregation took possession of the building and changed the locks. There were some acts of vandalism and destruction committed by some unknown persons. This action was commenced on 23rd April 1952.

The five plaintiffs bring a class action on behalf of themselves and the other members of the congregation. Four of them—Babion, Wasylyk, Turchinsky and Barylo—are trustees under the deed of conveyance. Of the four defendants three are trustees under the deed of conveyance. They are Susko, Kozak and Krilyk. Thus all seven trustees are before the Court in one capacity or another. The principal claim in the action is for an injunction to restrain the defendants from trespassing on what is alleged to be church property. The defence is that the building is owned by the Prosvita and not by the congregation. The foundation for the claim for the injunction is based upon the allegation in para. 6 of the statement of claim that steps thought to have been taken under s. 13 of The Religious Institutions Act vested the property in the congregation. Counsel for the plaintiffs sought to amend at the opening of the case to plead that the seven trustees hold in trust for the congregation and to ask for a declaration accordingly and for an order appointing the plaintiffs as trustees of the property for the congregation. The defendants opposed this motion to amend on the ground that it pleaded a new cause of action and for the first time The Statute of Frauds, R.S.O. 1950, c. 371, was mentioned as a possible defence.

The case presents difficulties. When the deed was taken in the name of the seven trustees there was no congregation.

There was only this nebulous unincorporated association of sixteen or seventeen members, most of whom, if not all, became the first members of the congregation. The evidence of Schurenko seems clear on this point and I accept it. There was initially no difference of any consequence in the membership of the two organizations. As time went on there were people who were members of the Prosvita who were not also members of the congregation and this divergence in membership grew.

The trust on the face of the conveyance—for the Canadian Ukrainian Society of Nelson Township—is assumed by the defence to be for the benefit of the association of which the defendant Susko is now the obvious leader. I do not think this assumption is warranted. Moreover, if this were the true character of the trust there would be a serious question of invalidity for offence against the rule against perpetuities. The Prosvita has no constitution. It is not a legal entity and it is not charitable. If the trust is one for the members of the association as it may be constituted from time to time, it is a trust which may last for an indefinite time and beyond the perpetuity period. Such trusts are void: *Carne v. Long* (1860), 2 DeG. F. & J. 75, 45 E.R. 550. There was no suggestion in the evidence given that the trust was intended to be for the membership of the Prosvita as it stood at the date of the conveyance, or that the trust could be terminated by the membership as it might exist from time to time. Such trusts as these are valid: *Cocks v. Manners* (1871), L.R. 12 Eq. 574 at 586; *In re Drummond*; *Ashworth v. Drummond*, [1914] 2 Ch. 90; 25 Halsbury 2nd ed. 1937, p. 83; Scott on Trusts, 1939, s. 119. I avoid further discussion of this subject. It is dealt with at length by Scott, *loc. cit.* I mention it merely to indicate that the type of trust set up by the evidence for the defence may lead to difficulty with the rule against perpetuities.

I am, however, satisfied on the evidence that this was not the trust. The trust was to build a church which could also be used as a community hall. The only money put in by the Prosvita was the \$500 to purchase the vacant lot. The building was erected with money from Mrs. Babion's mortgage and from a very substantial collection, said to be \$1,500, taken when the building was consecrated as a church. Mrs. Babion's mortgage has been paid off by the church authorities and an assignment has been taken. The Prosvita made no payment on this mort-



gage except one of \$50 for interest. When the trouble came both factions tried to pay off the mortgage. The financial contribution by the Prosvita was therefore small. It was not that of an association which was building a hall with its own funds.

Next, the consecration of the building as a church belonging to the Ukrainian Greek Orthodox Church and the attempt of the congregation to comply with The Religious Institutions Act is very strong evidence of the purpose for which the building was intended and no amount of oral contradiction of this evidence, given after the split had occurred, can destroy its force.

I have already mentioned s. 13 of The Religious Institutions Act. It reads in part as follows:

"(1) Any society or congregation on whose behalf land is now, has been or hereafter may be held by a trustee or trustees, without the manner of appointing successors being set forth in the grant, conveyance, or devise of such land, or which is or may be entitled to any land, at any time hereafter may assemble in a public meeting duly convened by notice in writing, signed by at least five members of such society or congregation, and affixed to the door of its place of worship, at least eight days before the day appointed for holding such meeting, and at such meeting, by the votes of a majority of the members present, may determine in what manner the successors to such trustee or trustees shall be appointed, or may appoint a trustee or trustees of any land to which the society or congregation is entitled, and determine in what manner their successors in the trust shall be appointed."

There is no evidence of any notice being given as required by the section. Susko was the only defendant present at the meeting. When the minutes deal with the property of the congregation and provide that it shall be held by the trustees appointed at the meeting, they do not describe either generally or specifically the building in question in this action. The position now taken by Susko is that the minutes have no reference to the building and that it was not property held in trust for the congregation. I have already stated that I think it was. But the proceedings taken in April 1950 under s. 13 of the Act were ineffective to vest the title to the property in the new trustees appointed at the meeting. If I am right in my conclusion as to the terms of the trust, there is nothing to prevent

the congregation from now complying with s. 13. Until this is done the title remains in the original seven trustees.

The Statute of Frauds, s. 9, was mentioned very late in these proceedings as an obstacle which the plaintiffs could not overcome in their effort to prove a trust for the congregation. The statute was not pleaded although it should have been under Rule 143. There was enough in para. 6 of the statement of claim as originally drawn to suggest a plea of the statute if it was the intention of the defence to rely upon it. The statute requires that a trust of land "shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust". There is in this case no evidence in writing of the trust apart from the original conveyance in trust. This suffices to satisfy the statute even though the trustees do not sign: Scott, *op. cit.*, s. 42(1). In my opinion the problem is not whether The Statute of Frauds has been complied with but whether the congregation can claim the benefit of the trust when the beneficiary is described as the Canadian Ukrainian Society of Nelson Township, which, the defence asserts, is in existence to-day and is a body that exactly answers the description. This defence is based on an assumption of identity which I do not think exists. It does not prevent me from considering evidence of identity and evidence directed to this point does not offend what is sometimes referred to as the parol evidence rule.

If A conveys land to B in trust for C and C is a person who is adequately described and whom the law recognizes, C can demand a conveyance of the land and oral evidence is not admissible for the purpose of showing that when A said C he really meant X. The case before me, however, is quite different. The Canadian Ukrainian Society of Nelson Township is not a legal entity. It could never demand a conveyance of the land. Quite apart from the question of the existence of the congregation, when the defence puts forward the association or Prosvita as the beneficiary, I still do not know what is meant—whether it is the original sixteen or seventeen members, the membership as it now exists or the membership as it may exist from time to time. But I do know what the membership as it existed at one time did with the property. It built and consecrated a church and formed a religious congregation. My opinion is that this congregation, which can act through appointed trustees, is the beneficiary of the trust.

It is apparent that although the action is constituted as a possessory action to restrain a trespass, the question of title has been in issue throughout. The plaintiffs may not have established title in the exact way in which they have pleaded it because they failed to show compliance with s. 13 of The Religious Institutions Act. But they have established that the property was held in trust for the congregation and this is the foundation for the application of s. 13. There is therefore no surprise and I allow the amendment.

The judgment will be as follows:

(a) An injunction restraining the defendants from trespassing upon the lands mentioned in the statement of claim.

(b) A declaration that the seven trustees hold the property in trust for the Ukrainian Greek Orthodox Congregation of St. Michael at Freeman, Ontario.

(c) The costs of the action and the interlocutory proceedings.

*Judgment for plaintiffs.*

*Solicitor for the plaintiffs: Theo. Humeniuk, Toronto.*

*Solicitor for the defendants: Daniel D. Stokal, Toronto.*

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[McLENNAN J.]

**Griffin v. The Town of Arnprior.**

*Municipal Corporations—Liability in Respect of Highways—Ice and Snow—What Constitutes “sidewalk”—Sanded Strip at Side of Road in Winter—Sufficiency of Sanding as Protection—The Municipal Act, R.S.O. 1950, c. 243, s. 453(1), (4).*

The defendant adopted a system of snow-clearance in winter whereby the snow on its streets (except in the business district) was merely pushed to the side of the roadway, where it gradually formed a snow-bank covering the sidewalks. A strip 2 feet in width, adjacent to the snow-bank, was sanded for the use of pedestrians.

*Held*, this conduct by the municipality did not convert the 2-foot strip into a “sidewalk” within the meaning of s. 453(4) of The Municipal Act, so as to require proof of gross negligence before a plaintiff could recover for an accident that happened on the strip. Nothing so intermittent and temporary as spreading sand could have the effect of making part of the roadway a sidewalk. *The City of Kingston v. Drennan* (1887), 27 S.C.R. 46; *Prentice et al. v. The City of Sault Ste. Marie*, [1928] S.C.R. 309; *Morrison v. The City of Hamilton*, [1939] O.R. 349, considered.

*Held*, further, while the sanding done by the municipality might have been sufficient on a sidewalk, it was not sufficient protection for pedestrians on a part of the roadway, where the sand was very rapidly dispersed by vehicular traffic. The municipality, knowing that the roadway was being used by pedestrians, as the result of the municipality's own system of snow-clearance, was under a duty to keep that part of the roadway in such a reasonable state of repair that pedestrians might pass to and fro upon it in safety, and it had failed in this duty, and was therefore liable under s. 453(1) of The Municipal Act. *Gartlan v. The City of Toronto*, [1942] O.R. 352, referred to.

**AN ACTION for damages.**

8th and 9th December 1952. The action was tried by McLENNAN J. without a jury at Pembroke.

*J. J. Greene*, for the plaintiff.

*H. P. Beahen*, for the defendant.

19th January 1953. McLENNAN J.:—The plaintiff's action against the defendant municipality is for damages for injuries sustained by her as a result of her falling on a highway within the corporate limits of the defendant municipality. She alleges that the accident occurred by reason of an accumulation of ice and snow on the highway, and by reason of the failure of the defendant to perform its duty to repair under s. 453(1) of The Municipal Act, R.S.O. 1950, c. 243.

The plaintiff's husband, Thomas A. Griffin, was originally a party to the action, but he died before trial, and a *praecipe* order was made that the action be continued at the suit of the plaintiff Grace Griffin.

The accident occurred on the 23rd January 1951 on McGonigal Street, a residential street running east and west in the town of Arnprior. The plaintiff and her husband lived in their home located on the south side of McGonigal Street, about 150 feet west of an intersecting street known as Russell Street.

At the time of the accident the surface of the roadway was covered with ice and snow, and the 4-foot cement sidewalk on the south side of the street was covered with a bank of snow and was impassable by pedestrians. The snow-bank on the sidewalk was created by the method of snow-clearance adopted by the defendant for all streets other than those in the main business section. Although a different system had prevailed earlier, when the sidewalks were ploughed and sanded, for some years prior to 1951 the system adopted was to plough the snow from the centre of the road toward the sides, and, as the winter advanced, the sidewalks became covered with a bank of snow which prevented pedestrians from using the sidewalk and forced them to use the roadway. The defendant, from time to time, sanded the 2-foot strip along the sides of the roadway adjacent to the snow-bank for the use of pedestrians.

On the day of the accident the plaintiff, aged 66, left her home about 4 o'clock in the afternoon to post a letter in a post-box on the north-west corner of McGonigal Street and Russell Street. She walked easterly to the corner along the south side of the road and noticed that the crossing was covered with glare ice, and decided it was too risky to cross, so she went to visit a friend living at the south-west corner. She said that on her return journey to her home along the south side of the roadway she was proceeding as cautiously as possible, but about half way between Russell Street and her home her feet slipped out from under her and she fell and suffered serious injuries, to be referred to later.

The defendant contended that the accident happened on a "sidewalk" within the meaning of s. 453(4) of The Municipal Act, and that the plaintiff must prove gross negligence in order to succeed, and it will be convenient to deal with this contention at this stage.

The defendant's argument was that notwithstanding the existence of a 4-foot cement sidewalk along the south side of McGonigal Street, nevertheless, by virtue of its occasional sand-

ing of a strip on the side of the ploughed roadway for the use of pedestrians, such a strip became a sidewalk within the meaning of The Municipal Act.

I am unable to agree with the defendant's contention. The question what is or is not a sidewalk has been considered in *The City of Kingston v. Drennan* (1897), 27 S.C.R. 46; *Morrison v. The City of Hamilton*, [1939] O.R. 349, [1939] 3 D.L.R. 159, and *Prentice et al. v. The City of Sault Ste. Marie*, [1928] S.C.R. 309, [1928] 3 D.L.R. 564. The first two cases arose out of accidents which had occurred at crossings at intersections, and in the *Drennan* case it was held that the particular area was a sidewalk, and in the *Morrison* case it was decided that the place where the plaintiff was injured was not a sidewalk. The distinction between the two cases is set out in the judgment of Robertson C.J.O. in the *Morrison* case, at pp. 351-2, as follows:

"In the former case [*The City of Kingston v. Drennan*, *supra*] the municipality had built a granolithic crossing in line with the sidewalk on each side of Princess Street, on which the accident occurred. The surface of the crossing was on a level with the sidewalk, except that the crossing sloped down from the centre on either side, no doubt to facilitate vehicles getting over it. The crossing was, however, placed there for the use of pedestrians and not as any part of a surface covering of the roadway . . . In the Supreme Court of Canada this crossing was held to be a sidewalk. I think the decision, however, is a decision upon the circumstances of that case and has reference only to crossings constructed for the special use of foot passengers walking up and down the street on which they are laid . . .

"The crossing here is of an entirely different nature. It is simply that part of the ordinary roadway for vehicular traffic which lies between the ends of the concrete sidewalk on the west side of John Street at its intersection with Main Street at this point. The pavement is of asphalt with the centre portion, where there are street car tracks, filled in with stone setts. There is also, near the place where the respondent fell, a small section paved with brick, where there is a grating for surface drainage. In every respect the crossing is part of the roadway and there is nothing whatever to distinguish it as set apart for the use of pedestrians.

"In my opinion there is nothing in the authorities relied upon by the appellant that compels us to hold that the crossing



now in question is a sidewalk within the meaning of sec. 480 of The Municipal Act, and I think it should be held that it is not a sidewalk."

In *Prentice et al. v. The City of Sault Ste. Marie, supra*, the plaintiff fell on a patch of ice on a private houseway leading from the sidewalk to the plaintiff's residence and the ice-patch was on the highway and immediately adjacent to the city sidewalk. The trial judge held that the place where the plaintiff fell was not a sidewalk, and this finding was approved in the Court of Appeal and in the Supreme Court of Canada. In his reasons for judgment at the trial Rose J. (as he then was) put the matter in this way: "It is not laid on the side of anything, and it is not part of the municipality's system of walks. Therefore, I think no question arises as to the necessity of proof of gross negligence."

In the case at bar the sanding of the strip is the sole basis of the defendant's contention that the strip is a sidewalk, and in every other respect it is part of the roadway. There was no special structure, as was the case in *The City of Kingston v. Drennan, supra*, and although it might be said to be part of the municipality's system of walks, I do not think that that by itself makes it a sidewalk. I do not believe that anything so intermittent or temporary as spreading sand could make what is part of a roadway a sidewalk.

The evidence establishes that from the edge of the snow-bank on the south side of McGonigal Street there is a slope downward to the north for a distance of from 5 to 6 feet, then up a slope to the crown of the road. While it is true, as submitted by counsel for the defendant, that the extent of that slope was not accurately measured, I have come to the conclusion, from the evidence of the witnesses, that it was visible and perceptible. There was also a slight grade from east to west, there being a drop of 7 inches in 60 feet from Russell Street to approximately where the accident occurred.

The plaintiff has satisfied me that at the time of the accident the south half of McGonigal Street between Russell Street and the plaintiff's home was icy and slippery. There is abundant evidence of this condition in the road, and there is no evidence to the contrary. I am also satisfied that the cause of the plaintiff's fall and the resulting injuries was the icy, slippery condition of the roadway, and the slope on the road

surface from the edge of the snow-bank toward the centre of the road, and that it was a combination of these two factors that caused the injuries to the plaintiff. It was not directly alleged in the statement of claim that the slope in question was a cause of the plaintiff's injuries, but no objection was taken to the evidence pertaining to it, or to my considering it as a basis of liability.

The plaintiff has also satisfied me that there was no sand adjacent to the snow-bank on the day of the accident, and that the south half of the roadway was in a slippery, icy condition for some days prior to the accident. On this point I attach particular importance to the evidence of Douglas Ray and of Joseph Correau, each of whom had a good opportunity to observe the conditions prior to the accident.

There was evidence that the defendant municipality from time to time distributed sand on the strip adjacent to the snow-bank. The books of the defendant show that sanding was done from time to time throughout the area of the town, and one of the employees said that McGonigal Street was sanded in this way on 22nd January, the day before the accident. This witness did not see the sanding done in the area of the accident, but only saw the men going in that direction.

While all the witnesses called by the plaintiff stated that sanding was done from time to time, it was also indicated that the effect of the sanding was very temporary, it being rapidly dispersed by motor vehicles which used the sanded strip to gain traction when the other parts of the road were icy. The defendant has not satisfied me that sanding was done on McGonigal Street between the plaintiff's residence and the corner of Russell Street on the 22nd January, and if sanding was done it was quite ineffective.

The defendant adduced evidence of the weather conditions on the day of the accident and the three preceding days. On the 20th and 21st January the weather conditions were cloudy with sleet and snow. On 22nd January the temperature was 16 degrees below zero and on the 23rd it was 4 degrees below zero.

On these facts the plaintiff says that the defendant municipality failed in its duty in not sanding more often, and in not sanding effectively, and that the road was out of repair by

reason of the downward slope to the north at the south edge of the highway.

The defendant argued that the municipality had done all that it reasonably could do, having in mind its population of approximately 5,000 people covering an area of one square mile in extent, and that the municipality could not reasonably be expected to do more than it did do in connection with sanding operations.

In considering whether or not the municipality should be held responsible for the plaintiff's injuries I have in mind that it would be quite impossible for the municipality to clear the strip along the side of ice and snow, or keep the entire roadway clear of ice and snow, in this climate. The sanding operations conducted by the defendant might have been satisfactory if used on a sidewalk where the sand was not subject to dispersal by motor traffic, but I have come to the conclusion that the municipality, knowing that the roadway, and particularly the sides of it, was being used by pedestrians, and so used as the result of the municipality's own system of snow-clearance, was under a duty to keep the roadway in such a reasonable state of repair that pedestrians requiring to use the road might, using ordinary care, pass to and fro upon it in safety, and this the municipality has not done: *Gartlan v. The City of Toronto*, [1942] O.R. 352, [1942] 3 D.L.R. 523.

It is also alleged by the defendant that the plaintiff was guilty of contributory negligence, based solely upon the fact of her statement at the trial, of which I made no note, that she did not notice that the road was slippery until she got to the corner of Russell and McGonigal Streets, and found no difficulty up to that point. I fail to appreciate this argument. It may be that she found no difficulty because she was going up-grade according to the grade running east and west at that time. She took all reasonable precautions so far as overshoes were concerned, and I cannot find any contributory negligence so far as she was concerned.

As to the damages, the plaintiff suffered a comminuted fracture of the upper left femur, with considerable displacement. When the fracture was set a pin and plate were inserted along the shaft of the femur. One fragment of the bone was broken off and was not affixed to the thigh-bone. The plaintiff is now 68 years of age and prior to the accident was able to look after



her own housework. Now her leg is 1 inch shorter; there is a limitation in the flexion of the knee; there is a certain amount of stiffness in the leg; her walk is moderately unsteady, and according to Dr. Samis her condition will not improve a great deal, and she will be unable to do all her housework again.

The out-of-pocket expenses of the plaintiff amount to \$735.81, and for pain, suffering and permanent injury I would allow the plaintiff \$4,000. There will therefore be judgment for the plaintiff for the sum of \$4,735.81 and costs.

*Judgment for plaintiff.*

*Solicitor for the plaintiff: J. J. Greene, Arnprior.*

*Solicitors for the defendant: MacCracken, Fleming, Beahen & Hall, Ottawa.*

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[COURT OF APPEAL.]

**Ellis v. London-Canada Insurance Company.**

*Insurance—Cancellation of Policy—Whether Unilateral Cancellation or Surrender and Termination by Agreement — The Insurance Act, R.S.O. 1950, c. 183, s. 197, stat. con. 12.*

A policy of automobile insurance was issued to one G, but after investigation the insurer decided that it did not want to be on the risk. It accordingly requested the agent, M, who had submitted the application, to return the policy for cancellation. M, who still had the premium in his hands, obtained the policy from G and refunded to him the full amount paid as premium. The policy was then returned to the company.

*Held*, what took place was not a unilateral cancellation by the insurer, under statutory condition 12 of the policy, but a surrender and cancellation by mutual agreement. Accordingly the plaintiff in this action, who had recovered judgment against G for an accident that happened a few days after the return of the policy and refund of the premium, had no claim against the insurer under s. 214 of The Insurance Act, since there was no insurance policy in force when the accident occurred. The cancellation became effective immediately, and not at the end of 30 days, as would have been the case if the insurer had cancelled the insurance unilaterally, under statutory condition 12.

Judgment of McRuer C.J.H.C., [1952] O.R. 644, reversed.

AN APPEAL by the defendant from the judgment of McRuer C.J.H.C., [1952] O.R. 644, [1952] 4 D.L.R. 316, in favour of the plaintiff.

15th January 1953. The appeal was heard by PICKUP C.J.O. and AYLESWORTH and GIBSON JJ.A.

*T. N. Phelan, Q.C.* (A. T. Hewitt, with him), for the defendant, appellant: The plaintiff's action is wrongly constituted. Under s. 214(1) of The Insurance Act, R.S.O. 1950, c. 183, this is a class action and can be brought only as such: *Barrett et al. v. Indemnity Insurance Co. of North America*, [1935] O.W.N. 321, 2 I.L.R. 392; *Harrison v. The Ocean Accident & Guarantee Corporation Limited*, [1948] O.R. 499 at 506, [1948] 3 D.L.R. 445, 15 I.L.R. 92.

The trial judge wrongly put on us the onus of proving that our policy had been surrendered. The onus is on the plaintiff to prove that the policy was in full force and effect at the relevant time, under s. 214(1): *Harrison v. The Ocean Accident & Guarantee Corporation Limited*, *supra*; *Dokuchia v. St. Paul Fire & Marine Insurance Company*, [1949] O.R. 170 at 176, [1949] 2 D.L.R. 171, 16 I.L.R. 67.

The trial judge held in effect that we attempted a unilateral cancellation of the policy under statutory condition 12(2). There is no suggestion of bad faith or connivance between us and Gillan. There is no evidence of either intent or effort on our part to effect cancellation under the statutory condition. On the contrary, the insurance was terminated by mutual agreement. Gillan voluntarily returned the policy for cancellation; there was no notice, as required by the condition, and no *pro rata* refund; the whole amount paid as premium was refunded: *McCoy v. British Traders Insurance Co. Limited* (1922), 22 O.W.N. 505. Terms such as "cancellation" are ordinary words, not technical terms, and should be given a business-man's meaning: *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham SS. Co., Ltd.*, [1938] 3 All E.R. 80, affirmed [1939] 2 K.B. 544, [1939] 1 All E.R. 819; *Canadian Atlas Diesel Engines Co. Ltd. v. McLeod Engines Limited*, [1952] 2 S.C.R. 122 at 132, [1952] 3 D.L.R. 513. It is always open to the parties to a contract to terminate it by mutual consent: 7 Halsbury, 2nd ed. 1932, p. 186, para. 263.

Section 214(1) of The Insurance Act, being in derogation of the common law rights of an insurer, must be strictly construed: 31 Halsbury, 2nd ed. 1938, p. 502.

Gillan's policy never came into force, because of the misrepresentation in the application, and consequently there was

no policy to which the plaintiff could have recourse: *Bourgeois et al. v. Prudential Assurance Company Limited*, 18 M.P.R. 334, [1946] 1 D.L.R. 139, 13 I.L.R. 1. [PICKUP C.J.O.: Does that make the policy void or merely voidable?] Under s. 200(1) of The Insurance Act any claim under the policy is invalid; we are not here dealing with common law rules as to fraud.

In any event, the plaintiff's costs of his action against Gillan could not be recoverable in this action; these costs are clearly not within ss. 209(c) and 214(1) of the Act.

*R. R. McMurtry, Q.C.*, for the plaintiff, respondent: There is no evidence that Gillan agreed that the policy should be cancelled. [AYLESWORTH J.A.: He was asked to return the policy for cancellation, which he did, and he accepted the full premium refund.]

It was not pleaded that this should have been framed as a class action. [PICKUP C.J.O.: Is that something that must be pleaded?] Yes, because we are taken by surprise. [PICKUP C.J.O.: If you come to the Court with your action improperly constituted you cannot get judgment.] If it is necessary, I ask for an amendment, *nunc pro tunc*, to constitute the action as a class action.

As to onus, we produced the policy and thereby established a *prima facie* case; the onus was then on the defendant to prove that the policy was no longer in force when our accident happened.

The *Bourgeois* case, *supra*, is not authority for the proposition that this policy was void *ab initio*.

*T. N. Phelan, Q.C.*, in reply.

*Cur. adv. vult.*

21st January 1953. The judgment of the Court was delivered by

PICKUP C.J.O.: This is an appeal by the defendant from the judgment of the Chief Justice of the High Court delivered on 27th June 1952, in an action tried without a jury.

The action was brought under the provisions of s. 214 of The Insurance Act, R.S.O. 1950, c. 183. The plaintiff suffered damages in an automobile accident which occurred on the 23rd September 1950. Action was later brought by the plaintiff against one Gillan, and in that action the plaintiff recovered a



judgment against Gillan on the 4th May 1951 for the sums of \$5,712.50 and \$15,250, and costs.

This action was brought against the appellant claiming that at the time of the accident Gillan was insured by the appellant under a policy said to have provided indemnity within the meaning of s. 214 of The Insurance Act.

The appellant issued its policy in favour of Gillan, and this policy was delivered to Gillan about the 6th September 1950. This policy, if in force at the date of the accident, would have provided indemnity to Gillan in respect of the damages claimed by the plaintiff in the action brought against Gillan. The appellant's policy referred to was, on its face, effective from the 31st August 1950. The reason for this was that the agent, one Marshall, had previously endeavoured to place the insurance with another insurance company, and had told Gillan that he would be held covered from 31st August. This was before Gillan had signed any application for insurance and the agent had still to get an application in writing, which he obtained, addressed to another company. The other company was not willing to assume the risk; the agent then placed the insurance with the appellant, he himself completing and sending the application to the appellant, taking the information from the application which he had from Gillan directed to the other insurance company. Gillan did not sign the application to the appellant.

After the appellant's policy had been sent to the agent the appellant caused certain investigations to be made and decided that it did not want to be on the risk. At that time the appellant did not know whether or not the policy had been in fact delivered to Gillan. The appellant at this time instructed its inspector at Ottawa to have the policy "picked up as soon as possible and returned . . . for cancellation". This was by letter dated 13th September 1950. In accordance with these instructions the inspector of the appellant, by letter to the agent Marshall dated 14th September 1950, requested him to return the policy for cancellation. Following these instructions the agent Marshall wrote to Gillan on 15th September 1950 informing him that the appellant had requested Marshall to return the policy for cancellation, and in this letter Marshall said to Gillan: "Kindly forward same to me and upon receipt of same, I will immediately forward my cheque for the original premium paid namely \$50.10."

Although the premium was \$62.12, the only amount paid by Gillan to the agent Marshall was the sum of \$50.10. That amount was in Marshall's hands, and had not been sent to the appellant. Upon receipt of this letter from Marshall, Gillan immediately returned the policy to Marshall, and Marshall, in accordance with the promise made by him to Gillan in his letter of 15th September, at once sent to Gillan his cheque for the full amount of premium which had been paid, namely, \$50.10. This cheque was cashed by Gillan on the 21st September 1950, and the policy was returned to the appellant by Marshall. All of this occurred before the accident.

The main argument on behalf of the appellant on this appeal was that in the circumstances above stated the policy was surrendered by Gillan by mutual agreement completed prior to the accident, and, therefore, that there was no insurance policy in force when the accident occurred. With due respect to the finding of the learned trial judge, I agree with this contention of the appellant, and on this ground the plaintiff's action fails.

Counsel for the respondent argued that the effect of what took place was that Gillan was merely returning the policy to the company to enable the company to cancel it in accordance with statutory condition no. 12, which is found in s. 197 of The Insurance Act. This is the statutory condition dealing with unilateral cancellation of a policy, and provides for the method of cancelling either by the insured or by the insurer. The appellant was not purporting to cancel the insurance by unilateral action, but was, I think, endeavouring to bring the insurance to an end by agreement with the insured, returning the full premium without any compensation for the period during which the policy may have been in force subsequent to the 31st August 1950. That it was so understood by the insured appears from a statement made by the insured in evidence. He stated in evidence that on a previous examination under oath he had said that he had no insurance of any kind in respect of his liability arising out of the accident in question; that the insurance went off on Wednesday night and the accident occurred on Saturday. This fits in with the facts above stated, the accident having occurred on the 23rd September and the insured having cashed the cheque for the return of the premium on the 21st.

In the view I take of the effect of what took place prior to the accident as to surrendering the policy, I need not determine on this appeal the question whether there was any misrepresentation knowingly made by Gillan to the insurance company, within the meaning of s. 200 of The Insurance Act.

I do not need to deal with the question raised by the appellant as to whether this action can be maintained otherwise than as a class action, or whether, even if the policy were in effect at the time of the accident, the plaintiff could, under it, recover the costs incurred by the plaintiff in the action brought against Gillan. I mention this only to make it clear that I am not, in this judgment, intending to concur in the view that this action could be maintained otherwise than as a class action, or in the finding that on the facts of the case, even if the policy were in effect, the plaintiff could recover the costs incurred by him in the action brought against Gillan.

The result is that this appeal should be allowed with costs, and the action dismissed with costs.

*Appeal allowed with costs and action dismissed with costs.*

*Solicitors for the plaintiff, respondent: Howe, McKenna & Howe, Ottawa.*

*Solicitors for the defendant, appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.*

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## [COURT OF APPEAL.]

**McLean v. The Guardian Insurance Company of Canada.**

*Insurance—Automobile Insurance—What is “collision”—Vehicle Coming in Contact with Bank of Road.*

Insurance of an automobile against loss or damage caused by “accidental collision with another object, moving or stationary” is capable of the construction that it is intended to cover a contact where a motor vehicle strikes and meets resistance from any object in the highway, even if that object is the earth itself, forming part of the highway. *Austin v. Jordan*, [1931] O.R. 526, applied; *London Guarantee and Accident Company v. Sowards*, [1923] S.C.R. 365, distinguished. The plaintiff's truck, because of the giving way of the shoulder of the road, slid down into a shallow ditch at the side of the travelled portion of the highway, and the rear end slid into a depression in the bank on the side of the road. The hind wheels hit this bank, resulting in damage to the truck.

*Held*, the damage was covered under a collision coverage in the form set out above.

AN APPEAL by the plaintiff from the judgment of MacRae Co. Ct. J., of the County Court of the County of Middlesex, dismissing the action.

19th January 1953. The appeal was heard by PICKUP C.J.O. and AYLESWORTH and GIBSON JJ.A.

*E. H. Slater*, for the plaintiff, appellant: The trial judge found as a fact that our truck did not come into collision with any object, and that the action must therefore fail. This finding is based on confusion in the trial judge's mind between the statement of our driver, McGill, to the adjuster, in which he was asked to state the cause of the *accident*, and his evidence at the trial, where he described his *collision* with the bank. The trial judge thought the two statements were contradictory, and found that McGill was not clear as to what happened. Actually, the two things are quite distinct, and there was no inconsistency or confusion. The finding of fact therefore cannot be supported on the evidence.

The trial judge further expressed the opinion that the policy would not cover us even if our wheels had come in contact with the bank. The bank of a hole is clearly an “object” and this was therefore a collision entitling us to indemnity. *London Guarantee and Accident Company v. Sowards*, [1923] S.C.R. 365, [1923] 2 D.L.R. 495, [1923] 2 W.W.R. 113, relied on by the trial judge, does not apply on the facts of this case, and in view of the changes made in the form of collision coverage since that decision. The case has been distinguished in the fol-

lowing cases, on which I rely: *Austin v. Jordan*, [1931] O.R. 526, [1931] 4 D.L.R. 292; *Dufour v. Frontenac Assurance Co.* (1936), 3 I.L.R. 610; *Collins v. The Guardian Casualty & Guaranty Company*, 25 B.C.R. 401, [1918] 2 W.W.R. 763, 40 D.L.R. 133; *McDonald v. The Guardian Insurance Co. of Canada*, 60 N.S.R. 262, [1929] 1 D.L.R. 518; I refer also to Laverty, *Insurance Law of Canada*, 2nd ed. 1926, p. 669.

It does not matter, under these authorities, that the tires were the only part of the truck that came into contact with anything; it is clear from the express exclusion in the policy that there may be a "collision" involving only a tire.

*E. J. R. Wright, Q.C.*, for the defendant, respondent: The trial judge's findings of fact should be accepted. There is an express finding that the vehicle did not come into collision with any other object. The onus in this respect is clearly on the plaintiff: *London Guarantee and Accident Company v. Sowards*, *supra*, at p. 373. [PICKUP C.J.O.: But the evidence before the Court, which was uncontradicted, was that there was such a contact.] Even if there was a contact, the damages must be shown to have been caused by it; we insure only against a collision that causes damage. On the evidence the trial judge would have been acting on conjecture if he had found that this contact caused the damage. It must be taken that the trial judge rejected McGill's evidence, although he made no express observation as to credibility: *Powell et ux. v. Streatham Manor Nursing Home*, [1935] A.C. 243 at 250, quoting from *Clarke v. Edinburgh and District Tramways*, [1919] S.C. (H.L.) 35.

To hold us liable on the evidence in this case would be to hold us liable for ordinary wear and tear. The new "comprehensive" form of coverage was adopted to take care of just such a case as this.

*Austin v. Jordan*, *supra*, based as it was on the particular circumstances in the case, is not authority for anything in this case. The dissenting judgment of Riddell J.A. expressly holds that the earth is not an "object", and the judgment of the majority does not disagree with him on this point.

As to the trial judge's findings of fact, and their effect in this Court, I refer also to *Watt or Thomas v. Thomas*, [1947] A.C. 484, [1947] 1 All E.R. 582; *Powell et ux. v. Streatham Manor Nursing Home*, *supra*; *Burnett v. Christie Brown & Co. Ltd. et al.*, [1946] O.W.N. 30.

[PICKUP C.J.O.: Do you rest your argument, apart from the question of fact, on the proposition that there is no liability for collision if the only contact is with a portion of the roadway itself?] Yes.

*E. H. Slater*, in reply.

*Cur. adv. vult.*

27th January 1953. The judgment of the Court was delivered by

PICKUP C.J.O.: This is an appeal by the plaintiff from the judgment of Judge MacRae, of the County Court of the County of Middlesex, in an action brought by the appellant against the respondent for damages caused to the appellant's truck when it left the travelled portion of the highway. The appellant was insured by the respondent against "direct loss of or damage to the automobile . . . caused solely by: . . . Accidental Collision with Another Object, Either Moving or Stationary, or by Upset". A proviso to the coverage of the insurance policy excepts liability for loss or damage "to any tire unless caused in an accidental collision which also causes other loss or damage to the automobile".

The learned trial judge held that the damages sustained were not caused by collision with any object, and it is conceded that there was no upset. The evidence clearly shows that if there was any collision, it could only have been collision with the roadbed itself in that portion of the highway off the travelled portion of the road. The learned trial judge accordingly dismissed the plaintiff's action, and from such dismissal the plaintiff appeals to this Court.

The findings of fact in this case do not turn on the credibility of witnesses. The only evidence before the Court as to what happened is the evidence of the plaintiff's driver and the evidence of the plaintiff, who went to the scene of the accident immediately after it occurred. The defendant called no evidence. The case must be determined on the facts as disclosed in the plaintiff's evidence.

According to the evidence of the driver, he was driving the truck loaded with gravel. He pulled to the right-hand side of the road; the shoulder of the road gave way; the load shifted; the hind wheels slid down in a shallow ditch; the truck travelled



down this ditch a little way; the rear end slid into a depression in the bank in the side of the road; it hit on an angle; the back end slid in on an angle and the hind wheels hit the bank. He says the damage was caused by the impact when the hind wheels struck the bank.

When the plaintiff went to the scene of the accident he found a deep gouge where the hind wheels had been driven into the bank, and marks along the shallow ditch. The bank referred to appears to be the side of an excavation or hole. The plaintiff said it looked as if some one had taken a couple of truck loads of dirt from the bank of the ditch and from the shoulder of the road.

The learned trial judge said that the evidence did not establish that the truck "was in collision with any particular object, even if a bank or side of a hole be considered an object". This finding is contrary to the evidence, and I would not accept it in the absence of any other evidence showing what caused the damage.

The learned trial judge also expressed the view that the damage to the truck might have resulted from a structural defect, such as the box being not sufficiently secured to the chassis to withstand the side pull when the vehicle skidded. There is no evidence to support that theory; although it may have been possible, that should not be assumed where the evidence is to the contrary and the damage could have been caused in the manner described by the plaintiff's witnesses. I, therefore, proceed to consider the rights of the parties on the assumption that the damage to the truck was caused by the hind wheels of the truck striking the so-called bank while the driver was endeavouring to proceed along the shallow ditch, or to get back upon the travelled portion of the highway.

The learned trial judge was of the opinion that the wording of the insurance policy above referred to did not cover the damages claimed, even if the damages were caused by collision with the bank referred to. Clearly, the truck did not strike any object other than the earth itself.

The learned trial judge seems to have been of the opinion that the case of *London Guarantee and Accident Company v. Sowards*, [1923] S.C.R. 365, [1923] 2 D.L.R. 495, [1923] 2 W.W.R. 113, governed this case. I do not think so. Some

of the learned judges in that case held that if a motor vehicle came in contact with the earth, which was part of the highway, that would not be regarded as being an accidental collision within the meaning of such policy. I do not in any way question the decision in the *Sowards* case, but I think what the learned judges said in that case must be considered in the light of the facts which the Court were considering. In that case the damage was caused by the motor vehicle upsetting, and the contact between the motor vehicle and the earth was the contact when the motor vehicle upset. That was not considered to be an accidental collision.

Since the decision in that case, what is called "collision coverage" in automobile policies has been changed in two respects. One is to provide expressly that the coverage does include damages resulting from upsetting. The other change is that whereas formerly the collision referred to was a collision with any other automobile, vehicle or object, the collision covered in such policies for many years has been expressed to be "collision with another object either moving or stationary".

The *Sowards* case was distinguished in the Court of Appeal for Ontario in the case of *Austin v. Jordan*, [1931] O.R. 526, [1931] 4 D.L.R. 292, where the majority of the Court held, under a policy worded as in the instant case, that it covered, as being collision with another object either moving or stationary, damages resulting where the rear end of a motor vehicle in passing over a bridge came in contact with the shoulder of the bridge. In that case, as the motor vehicle was leaving the bridge the front wheels went down into a depression in the roadway beyond the bridge, causing the rear end of the vehicle to strike the shoulder of the bridge itself. This decision of the Court of Appeal of this Province was over twenty years ago, and I think I should follow it, because I do not see any sound distinction between the rear end of a motor vehicle coming in contact with the shoulder of a bridge, which is part of the highway, and the rear wheels of the truck in question in this action striking an uneven surface such as the bank caused by an excavation in the roadway. I do not think it matters whether the excavation or hole was on or off the travelled portion of the highway.

In view of this decision of the Court of Appeal and the changes which have been made in this form of coverage since

the decision of the Supreme Court of Canada in the *Sowards* case, collision coverage such as is in question in this action is capable of the construction that such policies were intended to cover, as being collision with another stationary object, a contact where a motor vehicle strikes and meets resistance from any object in the highway, even if that object be the earth itself which forms part of the highway.

I would, therefore, allow the appeal with costs, and direct judgment to be entered in favour of the plaintiff for the sum of \$620.96 with costs.

*Appeal allowed with costs.*

*Solicitors for the plaintiff, appellant: Slater, Marshman & Porter, London.*

*Solicitors for the defendant, respondent: Wright & Poole, London.*

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## [COURT OF APPEAL.]

## Re Neilson.

*Executors — Compensation — Determination by Surrogate Court Judge — Review on Appeal — Whether Error in Principle Demonstrated — The Trustee Act, R.S.O. 1950, c. 400, s. 60(3).*

On appeal from the order of a Surrogate Court Judge allowing compensation of \$140,000 to an executor for a four-year period in administering an estate with an aggregate value of \$4,383,000, it was contended that in the particular circumstances of the case the executor had disentitled itself to any compensation, or, alternatively, that the compensation awarded was grossly excessive, and further that the beneficiaries were entitled to recover from the executor for breach of trust. *Held*, as to the alleged breach of trust, the evidence indicated rather that the sale of shares, alleged to have constituted the breach, was a good sale and very much in the interest of the beneficiaries, and this claim therefore failed on the evidence. In any event, it was not open to the beneficiaries to claim for breach of trust in these proceedings. *Held* further, as to the compensation (LAIDLAW J.A., *dissenting*), although some matters might have been improperly admitted in evidence before the Surrogate Court Judge, and considered by him in arriving at the amount to be awarded, the appellants had not satisfied the Court that the amount awarded ought to be disturbed. In particular, the appellants' submission that the executor should be limited to an allowance of 1 per cent. on large capital receipts and disbursements could not be supported, since to adhere rigidly to such a percentage in this estate would be to lose sight of the provisions of s. 60(3) of The Trustee Act, and would result in the executor's being inadequately compensated.

AN APPEAL from an order of Barton Sur. Ct. J., [1953] 1 D.L.R. 302, fixing the compensation to be allowed to an executor.

18th to 20th November 1952. The appeal was heard by HENDERSON, LAIDLAW, HOPE, HOGG and AYLESWORTH JJ.A.

*R. N. Starr, Q.C.*, for the adult children, appellants: The trustee would be adequately compensated in this estate if it were allowed 1 per cent. on large bulk capital items, 2 per cent. on other capital items, and 2½ per cent. on income receipts and disbursements, and nothing more. This would amount to \$74,146.12. There should be no special compensation for any of the special services set up by the trustee, such as the sale of the house, where the fact is that the testator's son went to the trustee's office and offered \$85,000, the value placed on the house for succession duty purposes, which was accepted by the trustee. Similarly, there should be no special allowance for computing the succession duties; this was a mere mathematical computation.

As to the sale of the shares of Neilson company stock, the trustee should have acquired complete knowledge about this stock, so that it could either retain or sell it to the best possible advantage. The only knowledge it acquired was from its own employee who made a valuation of the stock for succession duty

purposes. Only one offer was made for the stock, and it was made without any solicitation by the trustee, and was accepted three weeks after it was made. [AYLESWORTH J.A.: Did it come out in evidence whether the buyer made similar offers to the beneficiaries who owned shares in the company?] The same offer was made to the testator's brothers. The trustee did not obtain an independent valuation of the shares, or even of the real estate. No trial balance of the company was obtained, no efforts were made to have a valuation made by a chartered accountant, the business was not placed with a business broker, there was no consultation with the Official Guardian, or consideration of the possibility of refinancing the company or offering the shares to the public through an underwriter or to the members of the family. The offer for the shares was never considered by the whole board of the trustee company. [HOPE J.A.: Was there any evidence of negotiations by the buyer with the testator before his death?] Yes, there was evidence that there had been negotiations, but no mention of the price suggested in them, or of the stage they had reached.

The stock was sold at \$45 per share. An officer of the trustee gave evidence that shares in similar companies were selling at about twenty times their earnings, which would represent \$56 for the Neilson shares. The buyer was seeking a capital asset. The value should be the value of the physical assets plus earning capacity. No allowance was made by the trustee for refundable profits. When the purchaser issued a prospectus to float new preferred shares he showed a book value of more than \$80 a share. The trustee also failed to consider the value of the reputation and goodwill of the company; it was over-anxious to sell the business. The children did not want the business sold at that price. [AYLESWORTH J.A.: The wishes of the children were not the only matter for the trustee to consider.] No, its first duty was to determine the true value of the shares.

Finally, the trustee owed a duty of loyalty to its *cestuis que trust*. When a trustee seeks compensation on an audit it should put all the facts before the Court in a plain unvarnished way and let the judge decide what is proper compensation. It is not in the position of a plaintiff. Irrelevant evidence was given by the trustee before the Surrogate Court Judge, including a profit-and-loss

statement of the trustee's personal trust department. The trustee also filed a "brief", claiming to have made great savings for the estate by its administration, which gave a totally false picture. It indicated, for example, that it saved the estate over \$23,000 by issuing its own bond for succession duties at no cost to the estate. A bond was not necessary, since assets could have been pledged to secure the estimated duties pending the realization of the remaining assets. No mention was made in the statement of the fact that nearly \$1,500 was paid to the Ontario Government as interest because the full amount of succession duties was not paid in time. [AYLESWORTH J.A.: Your submission in respect of succession duties is that the trustee claimed approbation for doing things that it was its duty to do?] That is part of my submission.

The trustee claims that the estate benefited by its handling of the sale of the shares, but my submission is that by reason of its default in doing what a reasonable man would do to ascertain the value of the shares the estate suffered. The trustee also listed, as a benefit to the estate, the appreciation in securities not liquidated by it. It should have shown the other side of the picture; there was also a loss in selling other securities, and this was not pointed out in the memorandum. [AYLESWORTH J.A.: Your contention is that if the trustee chose to draw attention to favourable aspects of its administration it should also have drawn attention to the unfavourable ones?] Yes. The Surrogate Court Judge simply accepted the trustee's memorandum in computing the compensation; he did not exercise any discretion in the matter. [AYLESWORTH J.A.: Your whole point is that if the trustee is going to elaborate at all, it should do so by making full disclosure?] Yes. I go further than that, and say that the trustee has a duty to its *cestuis que trust* to disclose the whole truth. Only half the story was told, and the rest of the evidence was so coloured as to put on it a favourable complexion which was false to the trustee's knowledge, which it intended to have acted on, and which was acted on.

The cross-examination on behalf of the trustee of one of the *cestuis que trust* was wholly improper. Innuendos and implications were made that were in no way supported by evidence.



This cross-examination, considered in the light of the trustee's duty of loyalty, undermined the very fabric of the trust.

The Surrogate Court Judge erred in principle, in that he based the compensation on the size of the estate rather than the particular trust: *Re Atkinson*, [1952] O.R. 685, [1952] 3 D.L.R. 609.

The trustee should be allowed no compensation and no costs.

*F. T. Watson, Q.C.*, for the Official Guardian, representing grandchildren and unborn issue: I support Mr. Starr's argument to the extent that he contends that the learned Surrogate Judge misdirected himself as to the principles to be applied in arriving at compensation.

*D. J. Walker, Q.C.*, for the trustee, respondent: No reasons were given by the children for their objection to the sale of the business. [LAIDLAW J.A.: Were they asked?] No. [LAIDLAW J.A.: The variation between the trustee's different valuations on the shares, which ranged from \$12 to \$47, all within a short time, indicates that little reliance could be placed on its estimates.] Each valuation was based on a different premise. [LAIDLAW J.A.: If I had been the owner of the shares and someone had placed on them seven different valuations, varying as these did, I should not have been greatly impressed.] In any event, the trustee was given a wide discretion by the will. It received a firm cash offer of \$45 on a limited market, and it knew that the testator's two brothers were selling their shares at that price. Had we not sold our shares we should have been a minority shareholder.

The trustee was faced with an unusual problem in winding up the testator's personal holding corporation. It took nine months to wind up this corporation, and two sets of books were required, one for the estate and one as prescribed by law for corporations. [LAIDLAW J.A.: The trustee submitted a brief claiming extra compensation for many services, all of which were within the normal duty of the trustee.] [HENDERSON J.A.: The only problem beyond the ordinary liquidation of an estate was the sale of the Neilson stock.] A labourer is worthy of his hire, and all costs have increased. Our whole submission is based on a *quantum meruit* basis. The Surrogate Judge said he applied the principles enunciated in *Re Atkinson, supra*. [LAIDLAW J.A.: He said the same thing in that case.]

A careful perusal of all the bases of valuation indicates that every possible facet was considered. We are entitled to be compensated for the skill and ability shown by us in the administration of this estate. Each problem as it arose was solved expeditiously and well. There is no suggestion that the trial judge computed the compensation on anything other than a *quantum meruit* basis. I rely on *Re Mortimer*, [1936] O.R. 438, [1936] 3 D.L.R. 380; *Re Wilkinson* (1930), 39 O.W.N. 357, and *Re Atkinson*, *supra*.

*R. N. Starr, Q.C.*, in reply: The trustee had determined to sell the shares irrespective of what the brothers might do. Its primary duty in selling them was to act as a reasonable and prudent man, and the onus is on the trustee to show that it did so: Underhill's Law of Trusts and Trustees, 10th ed. 1950, p. 313. I also rely on *Re Boukydis*, 60 O.L.R. 561 at 563, [1927] 3 D.L.R. 558; *Cudney v. Cudney* (1874), 21 Gr. 153; *Bannerman v. Binks* (1925), 57 O.L.R. 265 at 267. The trustee does not yet understand its responsibilities in this estate.

*F. T. Watson, Q.C.*, in reply.

*Cur. adv. vult.*

20th January 1953. HENDERSON J.A.:—I have had the privilege of reading the opinions of my brother Laidlaw and my brother Aylesworth. I agree with the criticism made by my brother Laidlaw of the proceedings in the Surrogate Court. I do not think any good will result from referring this matter back to the Surrogate Court, and moreover I think that it is the duty of this Court to dispose of the appeal. I concur in the opinion of my brother Aylesworth and in his reasons therefor.

LAIDLAW J.A. (*dissenting*):—This is an appeal by the children of the late F. H. Morden Neilson from an order dated the 10th October 1952, made by His Honour Judge Barton in the Surrogate Court of the County of York, on the passing of accounts of National Trust Company, the executor and trustee of the last will and testament of the deceased, and trustee of a trust estate for each of the appellants. When the accounts were presented for audit the trustee annexed thereto a statement of suggested compensation for its services. That statement is made up in six parts prefaced by a summary which I reproduce as follows:

## "SUMMARY

|                               | Capital      | Revenue     |
|-------------------------------|--------------|-------------|
| Estate .....                  | \$111,569.07 | \$ 5,836.03 |
| Margaret Neilson Trust .....  | 2,603.92     | 1,862.71    |
| Graham M. Neilson Trust.....  | 5,728.46     | 1,519.85    |
| J. Harley Neilson Trust.....  | 6,079.43     | 875.04      |
| Shirley E. Pellowe Trust..... | 3,978.04     | 1,409.13    |
| Audrey E. Shields Trust.....  | 4,251.88     | 2,111.43    |

|  |                     |                    |
|--|---------------------|--------------------|
|  | <u>\$134,210.80</u> | <u>\$13,614.19</u> |
|--|---------------------|--------------------|

\$147,824.99."

The amount of compensation shown opposite each item in the summary was computed by applying a percentage to receipts and disbursements in each separate capital and revenue account and charging in addition a so-called management fee in each trust estate based on a percentage of the average value thereof.

After hearing evidence at length and argument of counsel for all interested parties, the learned judge allowed the executors the sum of \$140,000 in full compensation for its care, pains and trouble during the four years ending in August 1951. When the minutes of the formal order were settled, it was provided therein that the sum allowed as compensation be charged against the capital and revenue accounts of the estate of the deceased and the various trusts in proportions set forth in the order. The capital receipts of the estate of the deceased were charged \$103,744.08, which is \$7,824.99 less than the amount proposed in respect of that account by the executor in its statement of compensation and which is the difference between the total amount of compensation, namely, \$147,824.99, asked by the trustee for its services in all six trusts matters listed in its statement, and the amount of \$140,000 allowed by the learned judge. The revenue account of the estate of the deceased and the capital and revenue account of each trust were charged with the amounts proposed by the trustee in its statement of compensation.

I think that the learned judge of the Surrogate Court erred in principle and did not proceed in a proper manner in reaching his conclusion that the trustee was entitled to \$140,000 as compensation for its services.



The trustee asked for a separate stated amount in each of six trust estates. It was the duty of the learned judge to consider the care, pains and trouble and time expended by the trustee in and about each of those estates separately, and thereafter in the exercise of his discretion to decide what was a fair and reasonable allowance as compensation for services of the trustee in each of them. The beneficiaries of each estate to be charged with the amount allowed by the learned judge are entitled to have a separate judicial consideration of the question of what is a fair and reasonable allowance for the services for his or her benefit. It was not proper in the circumstances to make a total allowance to cover the services in all trust estates, then to reduce the amount asked by the trustee in respect of one account only, *viz.*, capital receipts of the estate of the deceased, and thereafter accept the proposal of the trustee as to the amounts to be charged against each of the other accounts.

It is to be observed, too, that in following the course taken by him the learned Surrogate Judge has in reality approved of a management fee proposed by the trustee in each trust and in the result has allowed such a fee. There is no statutory authority for such an allowance, and although I am not unaware of the practice of trustees asking for it, I am not willing to allow it as such or to give the appearance of any right of the trustee thereto.

There is another matter for consideration which makes the order in appeal unsatisfactory. The learned judge in his reasons for judgment referred to a statement filed "showing that the executor had accomplished a saving to the estate of various items amounting to more than a million dollars". That statement, standing alone, is subject to much criticism in that some of the items do not represent savings to the estate by reason of any unusual or special services rendered by the trustee. The statement must be considered in the light of all the evidence and with due regard to the normal duties of the trustee. When it is examined in that way some of the so-called "benefits or savings" do not deserve special mention or consideration and other items are reduced in importance. It appears to me that the statement was given undue weight by the learned judge and probably affected the exercise of his discretion to the disadvantage of the appellants in fixing the amount of allowance for compensation at \$140,000.

Finally, it is apparent from the record of proceedings, and it was made abundantly plain in the course of argument by counsel for the trustee in this Court, that he attached great importance to a "*pro forma* profit and loss statement of the personal trust department of National Trust Company" filed as ex. 4. That statement was not relevant to the matters in controversy before the learned Surrogate Judge. It should not have been admitted in evidence and neither the contents thereof nor any argument based thereon should have been considered in support of the amount of allowance asked by the trustee. I cannot say from the reasons for judgment that the learned judge did in fact give any weight or consideration to it, but judging from the manner in which it was pressed upon this Court it is not unlikely that it had some effect on the learned judge and that the appellants were prejudiced thereby.

I mention briefly the matter of allowance for costs for taking, auditing and passing the accounts. During the proceedings before the learned judge there was a lengthy cross-examination (19 pages of transcript) of one witness and, in my opinion, all or nearly all that cross-examination was irrelevant and improper. That was a matter which might well have been the subject of consideration in fixing the fees allowed by the learned judge, whereas it appears to me that he erroneously considered the cross-examination as proper.

It is my opinion that this Court should not review the statement of compensation proposed by the trustee in each of the various trust estates with a view to deciding whether the amount in each case is fair and reasonable or otherwise; nor should this Court consider whether or not the trustee is entitled to the total allowance of compensation made by the learned judge of the Surrogate Court when that total allowance, in my opinion, was made upon wrong principles and with undue weight to certain evidence adduced in support thereof. If the learned judge had proceeded upon proper principles and with due regard to relevant evidence, it is reasonably certain that he would have reached a different result. I cannot say what allowance he might have made in each case and I think that I should not substitute my discretion for his.

My opinion is that the order of the learned judge of the Surrogate Court should be set aside and the whole matter in controversy should be remitted to him to consider and decide on

the basis prescribed by statute what is a fair and reasonable allowance for the care, pains and trouble and time expended by the trustee in and about each of the trust estates. The appellants fail on many of the grounds advanced in argument in support of the appeal and I do not grant the relief sought by them. Likewise the support given to the appeal by the Official Guardian fails. Therefore, I would not allow any costs in this Court.

HOPE and HOGG JJ.A. agree with AYLESWORTH J.A.

AYLESWORTH J.A.:—This appeal is taken by the four children of the deceased against the order of His Honour Judge Barton, of the Surrogate Court of the County of York, dated 18th September 1952. That order deals with the respondent's accounts as executor for the period 27th August 1947 to 26th August 1951. The appeal is directed against the allowance to the respondent for its compensation and also against the costs of the audit as fixed by the order.

The submissions made by the appellants are unusually comprehensive. Appellants submit that in the particular circumstances the respondent has disentitled itself to any compensation or to any costs of the audit and, if the appellants fail in that, they say the compensation is grossly excessive and was determined upon an error or errors in principle. Further, they seek substantial recovery against the respondent for alleged breach of trust in carrying out the sale of the deceased's shares of the common stock of the Neilson company.

The late Mr. Neilson died on 26th August 1947, leaving an estate valued in round figures at \$4,383,000 less a "book entry" of some \$343,000 set up in the books of his personal holding company, Raymur Securities Company Limited, as an account between the deceased and that company. The estate assets may be listed approximately as follows:

|                                                  |             |
|--------------------------------------------------|-------------|
| Cash in banks .....                              | \$ 320,000  |
| Bonds—Dominion and municipal .....               | 11,000      |
| Stocks .....                                     | 3,600,000   |
| Real estate .....                                | 98,000      |
| Household goods and personal effects .....       | 14,000      |
| Life insurance .....                             | 313,000     |
| Miscellaneous assets, including book debts ..... | 27,000      |
|                                                  | <hr/>       |
|                                                  | \$4,383,000 |



Among the stocks were included the shares held by the deceased in the capital stock of his personal holding company valued at an approximate \$3,539,000, including as an item of that value the book entry to which reference has been made. The Raymur Company itself held assets, exclusive of the book entry, which are given in approximate figures:

|                                                                                                     |    |             |                                                           |
|-----------------------------------------------------------------------------------------------------|----|-------------|-----------------------------------------------------------|
| Cash .....                                                                                          | \$ | 80,000      | (after deduction<br>of miscellaneous<br>accounts payable) |
| Bonds—Dominion .....                                                                                |    | 184,000     |                                                           |
| Stocks (in 52 Canadian and<br>American corporations, in-<br>cluding the Neilson com-<br>pany) ..... |    | 2,752,000   |                                                           |
| Life insurance .....                                                                                |    | 180,000     |                                                           |
|                                                                                                     |    | <hr/>       |                                                           |
|                                                                                                     |    | \$3,196,000 |                                                           |

The deceased by his will, after directing the payment of debts and certain sums to charities, set up rather elaborate provisions with respect to his valuable city and summer residences, created a trust in favour of his widow to pay her the annual income from \$250,000 and, subject to the foregoing, divided the residue of his estate into four shares, one share for each child or for a child's descendants. Trusts were set up with respect to the children's shares, providing for ultimate distribution to them of all or a portion of the capital over a period of years, with income payable to them upon their shares in the meantime. The will is a lengthy one and the inevitable contingencies which may arise, as the result of a testamentary disposition of this kind, are dealt with by the testator *in extenso*.

By order dated 23rd December 1947 and made pursuant to the provisions of The Dependents' Relief Act, now R.S.O. 1950, c. 101, substantially more generous provision was made for the widow than that provided for her under the will. The family, at the outset at least, was not in agreement with respect to the adequacy or inadequacy of the testator's provisions for his widow. The stipulations in the will respecting family occupancy and enjoyment of the testator's summer residence either caused or did nothing to alleviate a troublesome situation. With-

in a very short time of Mr. Neilson's death an offer was received for the purchase of his holdings in the Neilson company and it has been made apparent that here also no lasting unanimity as to the course to be pursued was achieved between the appellants and the executor. Because the testator directed partial distribution of capital and income to the children at various ages and gave each daughter, as to part of a share, a life interest only, elaborate calculations were both desirable and necessary with respect to the time and method of payment of succession duties, quite apart from any question of succession duties valuations. In due course the duties were paid upon what was considered by respondent to be the most effective basis, having in mind the interests of the beneficiaries.

The personal holding company, Raymur Securities Company Limited, was liquidated both through the sale of some of the securities held by it and through the transfer in specie of other of those securities. Consequent upon the sale or transfer of those securities and the general administration of the estate, including payment of succession duties, the appropriate trusts were set up by the respondent in the respective interests of the widow and of each of the four children. Pending the liquidation of the holding company the records of that concern as a corporation were kept and the appropriate corporate returns, including, we are given to understand, many returns which were in arrear, were prepared and filed.

This general but by no means exhaustive summary of the nature of the assets and of the problems confronting the executor will suffice in dealing *seriatim* with the points in issue in the appeal.

The deceased's holding in the Neilson company consisted of 39,046 shares of its common stock, out of a total of 100,000 shares outstanding. The company was a "family company" in that the shares were owned by various family members and were not listed on any stock exchange, the deceased was the principal officer and virtual directing head of the company and others of the family were also engaged in the company's affairs. Three weeks after Mr. Neilson's death, namely, on the 17th September 1947, Mr. Garfield Weston submitted to the respondent a written offer to buy the estate's holding in the Neilson company at a price of \$45 cash per share, at the same time advising respond-

ent that the same price was being offered to the other principal shareholders. This offer by subsequent letter was limited to expire on 7th October unless sooner accepted; it was accepted in fact on that day or on the day previous. Much has been said in argument in criticism of this sale. It is said to have constituted a breach of trust on the part of respondent in that respondent did not inform itself of the real value of the assets and business of the company, and, in consequence, of the real value of the shares, and it is also said to have been an improvident sale.

Paragraph numbered IX of the will reads, in part, as follows: "At the present time I hold a substantial number of shares in William Neilson Limited. I authorize and empower my Trustees to retain my said shares in the said company as long as they consider it in the best interests of my estate so to do, but should my Trustees at any time consider that it would be in the best interests of my estate to sell my shares in the said company or any of them then, notwithstanding anything hereinbefore contained, I authorize and empower them to do so at such time and upon such terms as in their absolute discretion they shall consider to be in the best interests of my estate, receiving in payment therefor, cash or other securities or part cash and part other securities."

Paragraph XV of the will includes the following: "As I have every confidence in the fair-mindedness and good business judgment of my brothers, Charles E. E. Neilson and Allen Neilson, it is my strong wish and I request that my Trustees consult with them on all important matters connected with the administration of my estate, especially in connection with the William Neilson Limited, and keep them in as close touch as possible therewith. This expression of my wish and desire is not intended to limit or interfere in any way with the powers given to my Trustee as to the realization, investment, handling and carrying on of my estate generally."

The brothers, active participants in the Neilson company's affairs and substantial shareholders in their own respective rights, in fact were consulted by the respondent; they favoured acceptance by the estate of the Weston offer and they themselves sold their own shares at the same price to Weston at or about the same time as the estate's shares were sold.



I am of the opinion that both appellants' contentions fail and that the evidence, viewed in the light of the relevant surrounding circumstances, including the nature of the deceased's holding, establishes conclusively that the sale made by respondent was a good sale and decidedly in the best interests of the beneficiaries. This finding, without more, precludes the appellants from any recovery in these proceedings against the respondent for breach of trust in connection with that sale, but in any event I do not think it is open to the appellants upon this appeal to claim for recovery for breach of trust. This finding also establishes respondent's right to have the fact that the sale was made fairly considered in the determination of its compensation, unless for other reasons it has disentitled itself to any.

The remainder of the appellants' submissions have really to do with compensation *per se* and with what occurred in the presentation of respondent's claim for it. It is said, and with this I agree, that much evidence was introduced in the Surrogate Court which was entirely irrelevant to the issues. The further submission is made, however, that the introduction of this irrelevant evidence was in some sense "disloyalty" on the part of the respondent toward its *cestuis que trust*. The respondent is said also to have unduly stressed, indeed to have exaggerated unwarrantedly, or to have misstated the facts with the object of unduly favouring itself in the matter of *quantum* of compensation, and objection is taken to the severity and scope of the cross-examination inflicted upon one of the beneficiaries called to give evidence in the proceedings. In these matters, too, it is alleged that the respondent was disloyal to its *cestuis que trust* in that it placed its interest in the amount of its compensation in conflict with its duty.

In the circumstances of this particular case none of these submissions, although most ably and persuasively advanced in argument on behalf of the appellants, impresses me as a matter which affects the right of the respondent to compensation or the amount thereof. An executor or trustee ought always, of course, to place all relevant matters simply and fairly before the tribunal called upon to review the work of the executor or trustee and to award appropriate compensation. Any tendency, if tendency there be, to pursue any other course can find no commendation. In the instant proceedings, however, the appellants in opposing

the respondent on the question of compensation were ably represented by counsel and any inaccuracies or overstatements which may have been made were decisively challenged. A certain warmth engendered in the proceedings and carried into the cross-examination complained of was not helpful, but in the result this appeal falls to be disposed of in this Court upon the determination of two questions only, that is to say: Has error in principle clearly been demonstrated in the fixing of the compensation, and if so, then should the amount awarded be reduced?

The learned Surrogate Judge in his reasons for judgment states in part: "By reason of a prepayment of duty the executor was successful in saving some \$470,000. In fact, a statement was filed showing that the executor had accomplished a saving to the estate of various items amounting to more than a million dollars." The statement referred to by his Honour was filed by respondent as ex. 1 and was entitled "Summary of Benefits or Savings to the Estate". An examination of this exhibit reveals that most, if not all, of the alleged "savings" were computed by contrasting what the respondent actually had done with respect to certain problems in the administration with some other course of conduct which respondent suggests it might have followed. I think an examination of the subject-matter of the exhibit amply demonstrates the fallaciousness of such an approach to the question of compensation. In effect, the respondent claims "savings" to the estate for having dealt with the problems it cites in a competent and business-like manner rather than in some other manner which might have been the subject of serious criticism from the viewpoint of what was reasonably sound and efficient administration. Perhaps in one sense the results of what the respondent did were "savings" to the estate but I think that word is a complete misnomer when, in actual fact, the respondent, as was to be expected, was merely discharging capably its responsibilities as executor.

Elsewhere in his reasons the learned Surrogate Judge enunciates the principles to be applied to the fixing of compensation and states that he has applied them, but it well may be that the admission of much irrelevant evidence as to the "net profits" of the estates department of the respondent and the view taken by the learned Surrogate Judge as to the "savings" allegedly

made, unduly affected his application of those principles to the matters in hand.

Assuming this to be the case, but without so finding, appellants do not thereby become entitled to succeed in this appeal. Here, as in *Re Atkinson*, [1952] O.R. 685, [1952] 3 D.L.R. 609, this Court has before it all of the relevant facts touching upon the matter of compensation. What was said in *Re Atkinson* as to the proper approach to the question need not be repeated, but applying, as I do, the principles therein stated to the facts of this appeal I am not persuaded that the amount of the compensation as awarded ought to be disturbed. Counsel for the appellants filed a memorandum of compensation as proposed by him in the event that the Court did not accede to his submissions that respondent was entitled to nothing. The most important feature of his submission, and of his memorandum in support of appellants' contention for a greatly reduced compensation, is the suggested allowance to the respondent of 1 per cent. on large capital receipts and on large capital disbursements. If such a percentage upon such items were to be rigidly adhered to in this estate I think the all-important provisions of the statute (The Trustee Act, R.S.O. 1950, c. 400, s. 60(3)) would be lost sight of and the respondent would be inadequately compensated.

For these reasons the appeal fails on all grounds and will be dismissed. The costs of all parties may well be paid out of the estate, those of the executor as between solicitor and client.

*Appeal dismissed, LAIDLAW J.A. dissenting.*

*Solicitors for the appellants: Farrell, Gauld & Hill, Toronto.*

*Solicitor for the executor, respondent: David J. Walker, Toronto.*

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## [COURT OF APPEAL.]

**Alexander v. The Toronto, Hamilton and Buffalo Railway Company and Ricker.**

**O'Hanley v. The Toronto, Hamilton and Buffalo Railway Company and Ricker.**

*Railways — Negligence — Level Crossing — Compliance with Statutory Requirements and Board Orders—Whether “Special Circumstances” Exist Imposing Duty at Common Law to Take Additional Precautions.*

The plaintiffs sued for damages arising from a collision between a train and an automobile at a level crossing. They did not attempt to establish negligence by reason of the breach of any statutory provision or any order of the Board of Transport Commissioners or its predecessors, but contended that by reason of “special circumstances” existing at the crossing in question there was a duty on the railway at common law to take additional precautions there. The “special circumstances” on which they relied were: (1) the existence of a “short sight-line” at the crossing; (2) the existence of an “abrupt and sharp curve” in the line near it; (3) the existence of poles and vegetation on the right-of-way obstructing or limiting the view of the train approaching the crossing; (4) the knowledge of the railway company, and its engineer, that the crossing was a dangerous one, because of previous accidents there and other circumstances.

*Held*, the plaintiffs could not succeed. The first two matters relied on were within the competence of the Board of Transport Commissioners which, with full knowledge of the conditions at the crossing, had not limited the speed of trains on it, or ordered the taking of any unusual precautions there. The existence of poles and vegetation on the right-of-way was not, in the circumstances, a factor causing or contributing to the collision. Finally, the evidence did not establish that either the railway company or the engineer regarded this crossing as an exceptionally dangerous one. There was nothing done by the railway or its employees to create a dangerous situation and the plaintiffs had failed to show that there was any special circumstance or any common law duty on the railway or the engineer to take special precautions.

APPEALS by the defendants from judgments of Kelly J., entered on the findings of a jury, in two actions tried together.

19th and 20th January 1953. The appeals were heard by LAIDLAW, ROACH and J. K. MACKAY JJ.A.

C. F. H. Carson, Q.C. (*Halliwel Soule*, with him), for the defendants, appellants: There were no allegations of special circumstances, requiring additional precautions by us at this intersection. The jury's finding that the train was operated at a high rate of speed is not a finding of negligence in law: *Anderson v. Canadian National Railway Company*, [1944] O.R. 169, 56 C.R.T.C. 379, [1944] 2 D.L.R. 209; *Gagné v. Canadian National Railway Company*, [1945] O.W.N. 507, [1945] 4 D.L.R. 273.

[LAIDLAW J.A.: The special circumstances on which the plaintiffs rely are the limited view, knowledge of prior accidents, and

the topography.] Yes, but they are not special circumstances as understood by the law. To constitute a special circumstance there must be something special on the particular day that is different from other days: *Hendrie v. Grand Trunk Railway Co.* (1921), 51 O.L.R. 191, 29 C.R.C. 72, 67 D.L.R. 165. Every railway crossing is dangerous; the mere fact that an accident is possible is not a special circumstance: *Canadian National Railways Company v. MacEachern*, [1947] S.C.R. 64, 61 C.R.T.C. 1, [1947] 1 D.L.R. 816.

The speed of the train could not constitute negligence in the absence of special circumstances. No duty was imposed on us by statute or by order of the Board of Transport Commissioners in respect of speed at this crossing: *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81, 3 C.R.C. 52; *Walker v. Grand Trunk R. W. Co.* (1920), 47 O.L.R. 439 at 449, 26 C.R.C. 357, 53 D.L.R. 595; *Bayda v. Canadian Pacific Railway Company*, [1950] 2 W.W.R. 97, [1950] 3 D.L.R. 742 at 750.

The plaintiffs did not allege in their statements of claim that the railway was negligent in permitting its trains to operate at a high rate of speed. Therefore the finding of speed as negligence cannot stand: *Cooledge v. Toronto R. W. Co.* (1907), 10 O.W.R. 739; *McDonald v. Sydney & Louisburg Ry. Co.*, 1 M.P.R. 134, 36 C.R.C. 401, [1930] 2 D.L.R. 208; *Humphrey Funeral Chapel v. Gray Coach Lines Ltd.*, [1952] O.W.N. 490.

There was no evidence to support the jury's finding that there was vegetation growing along the right-of-way in such a way as to obstruct the view of a person approaching from the east. In any event, this ground of negligence, not having been pleaded, cannot stand.

The jury's finding of negligence against the defendant Ricker in not exercising due care and caution, having knowledge that this was a dangerous crossing, is too vague to constitute a finding of specific negligence. It is no more than a statement that Ricker was negligent: *The Grand Trunk Railway Company of Canada v. Murphy*, [1924] S.C.R. 101, 29 C.R.C. 398, [1924] 1 D.L.R. 450; *Donovan v. Toronto Transportation Commission and Hodgins*, [1949] O.W.N. 723 (new trial ordered, 65 C.R.T.C. 261, [1950] 3 D.L.R. 241).

In any event, the finding that the plaintiffs' damages were caused by Ricker's negligence is perverse. It is not disputed that

Alexander's car stopped on the tracks before it was hit. After coming around the curve the train could not have been stopped, even if the engineer had applied his emergency brake the moment he rounded the curve. No act of Ricker's could have prevented the collision after the train rounded the curve, and before that time he had no reason to believe that an accident was probable.

It was the negligence of Alexander that caused the accident. If Alexander drove on to the track after the train rounded the curve, he was clearly negligent in not looking to the east for an approaching train and in not listening for a whistle or bell before driving on to the tracks. He was under a duty to look and listen before driving on to the track: *The Canadian Pacific Railway Company v. Smith et al.*, 62 S.C.R. 134, 26 C.R.C. 382, 59 D.L.R. 373, [1921] 3 W.W.R. 300; *Blair v. Grand Trunk Railway Co.*, 53 O.L.R. 405, 29 C.R.C. 26, [1924] 1 D.L.R. 353; *Friedman v. Canadian National Railway Co.* (1924), 31 C.R.C. 401. An engineer is entitled to assume that a person approaching a railway track in a vehicle will exercise ordinary care and diligence to protect himself: *City of London v. Grand Trunk R. W. Co.*; *Summers v. Grand Trunk R. W. Co.* (1914), 32 O.L.R. 642 at 644, 18 C.R.C. 174, 20 D.L.R. 846; *Leviton v. Canadian National Railway Co.*, 14 M.P.R. 355, 51 C.R.T.C. 398, [1940] 1 D.L.R. 622 at 623; *Canadian National Railways Company v. MacEachern*, [1947] S.C.R. 64 at 77, 61 C.R.T.C. 1, [1947] 1 D.L.R. 816.

If, on the other hand, Alexander stalled on the tracks before the train rounded the curve both he and O'Hanley were negligent in not maintaining a sharp look-out and listening carefully for approaching trains as they sat on the tracks.

The negligence of Alexander, or of Alexander and O'Hanley combined, was the sole cause of the accident, or, at the very least, contributed to it.

The learned trial judge erred in failing to direct the jury as to the duty of persons sitting in a car that is stalled on a railway track, to look and listen for approaching trains and get out of their way. He also erred in directing the jury as to what might be considered evidence of special circumstances.

*S. Paikin*, for the plaintiff O'Hanley, respondent: I shall deal only with special circumstances, which, we allege, consisted in the short sight-line, the sharp and abrupt curve, and the poles and vegetation obstructing the view, together with the railway com-



pany's knowledge of these facts and of the facts that previous accidents had happened at this crossing and that there had been petitions and applications to the Transport Board. Mr. Parker and I concede that if the Court does not accept these as special circumstances we cannot succeed. [LAIDLAW J.A.: The term "special circumstances" is used in relation to the manner of operation, and includes such operations as the "flying shunt", or the case of one train blocking the view of vehicular traffic and concealing the approach of a fast-moving train. A jury cannot determine whether a crossing is dangerous in itself; that is for the Transport Board.] Such an interpretation unduly confines exceptional circumstances to exceptional operations: *Gagné v. Canadian National Railway Company*, [1945] O.W.N. 507, [1945] 4 D.L.R. 273; *Ham v. The Grand Trunk Railway Company* (1861), 11 U.C.C.P. 86; *Canadian National Railways v. Pomerleau*, [1931] S.C.R. 287, 37 C.R.C. 438, [1931] 1 D.L.R. 209; *Jenner v. South Eastern Railway Company* (1911), 105 L.T. 131. [MACKAY J.A.: Is it your submission that the engineer of a train is under a duty to keep his train under such control that when he rounds a curve and sees a car stalled on a crossing he can stop the train before reaching the crossing?] Yes. [LAIDLAW J.A.: Grant J. held in *Reynolds v. Canadian Pacific Railway Co.*; *Craig v. Canadian Pacific Railway Co.*, 59 O.L.R. 396, 32 C.R.C. 376, [1926] 4 D.L.R. 458 (new trial ordered [1927] S.C.R. 505, 33 C.R.C. 55, [1927] 3 D.L.R. 888), that it was not negligence to operate a train in a cut approaching a crossing at a fast rate of speed, and that the matter of the view and of embankments was solely for the consideration of the Railway Board.] The company had full knowledge that this particular crossing was dangerous. [LAIDLAW J.A.: It had knowledge that some people thought it was dangerous, but the Transport Board had ruled that no additional precautions were necessary.]

*W. D. Parker*, for the plaintiff Alexander, respondent: It is not sufficient for the railway company to say that it has complied with all statutory provisions and orders as to signs and signals. There is still a duty at common law to take care in circumstances calling for special care. [LAIDLAW J.A.: Do you agree with Mr. Paikin that if the Court is of the opinion that there are no special circumstances in this case the plaintiffs must fail?] Yes. [ROACH J.A.: You say that having regard to the physical cir-

cumstances the engineer was required to round the curve at such a speed that he would be able to bring his train to a stop at the crossing if he saw that someone was likely to be hit?] Yes. [LAIDLAW J.A.: Then was it his duty to anticipate that there would be a car there before he could see it?] I do not go as far as that. I confine my propositions to the facts at this particular crossing with its special circumstances.

I ask leave to amend both statements of claim so as to plead that the company was negligent in allowing high grass, vegetation and poles to obstruct the sight-line. [LAIDLAW J.A.: Had that been pleaded, the railway could probably have shown authorization for the poles.]

*C. F. H. Carson, Q.C.*, in reply: There is no duty to keep the speed of the train so low that there cannot be an accident. There was no duty to reduce speed before the driver saw the danger of an accident. A car is more easily manoeuvred than a train. We object to the proposed amendment; there was never anything to suggest, before the trial, that anything would be made of the poles and vegetation.

*Cur. adv. vult.*

28th January 1953. The judgment of the Court was delivered by

LAIDLAW J.A.:—The appellants are The Toronto, Hamilton and Buffalo Railway Company and Walter Ricker, one of its locomotive engineers. They were defendants in two actions tried together before Kelly J. and, after findings of a jury, judgment was given on the 16th October 1952 for the respondent Jessie Alexander for \$35,250 and costs, and for the respondent Wilbert O'Hanley for \$4,964.13 and costs. The appeals from those judgments were argued together in this Court.

The actions were brought to recover the loss and damage resulting from a collision on a level railway-crossing between a steam train of The Toronto, Hamilton and Buffalo Railway, of which the appellant Ricker was engineer, and a motor vehicle driven by Frederick Alexander, deceased husband of the respondent Jessie Alexander. The late Frederick Alexander was killed by the collision and the respondent O'Hanley, who was a passenger in the motor vehicle, suffered personal injuries by reason thereof.

The questions submitted to the jury and their answers thereto are as follows:

"1. Were the damages suffered by the Plaintiffs caused or contributed to by any negligence or want of care on the part of the Defendants T. H. & B. Railway Company or of their Engineer, Walter Ricker? Answer 'Yes' or 'No'—Answer: Yes.

"2. If your answer to the first question is 'yes', then in what did such negligence consist? Answer fully. Answer: The T. H. & B. Railway Company was negligent in that they having full knowledge of the special circumstances that existed at the Cochrane Road Crossing, did permit and allow their trains to operate at a high speed at that point, and that Walter Ricker was negligent in that he did not exercise due care and caution in the operation of the locomotive at the Cochrane Road Crossing having full knowledge that this was a dangerous crossing as attested to by the previous accident in which Walter Ricker was involved and the fact that both the T. H. & B. Railway Company and Walter Ricker admit to blowing train whistle at this point contrary to City of Hamilton By-law No. 3553, and the T. H. & B. Railway Company did not maintain their right of way in a manner compatible with the restricted vision in that they allowed vegetation to grow to a height which restricts the view from Cochrane Road to the east on the north side of the rails.

"3. Have the Plaintiffs satisfied you that the loss or damage suffered by the Plaintiffs did not arise through the negligence or improper conduct of the late Frederick Alexander, the owner and driver of the motor car which was in collision with the train operated by the Defendants? Answer 'Yes' or 'No'—Answer: Yes.

"4. If you find that the damages suffered by the Plaintiffs were caused or contributed to by the negligence of the Defendants and of the late Frederick Alexander, then in what proportion do you determine the respective degrees of negligence of each—

|                                       |                     |
|---------------------------------------|---------------------|
| "Answer: The late Frederick Alexander | per cent.           |
| The Defendants                        | 100 per cent.       |
|                                       | <hr/> 100 per cent. |

"5. Regardless of who you find is responsible for the damages suffered by the Plaintiffs or in what proportion you determine the respective degrees of negligence of those responsible, in what amount do you assess the total damages of the Plaintiffs:



“Answer: Jessie Alexander—\$35,250.00  
Wilbert O’Hanley—\$1,464.13 special  
3,500.00 general  

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4,964.13 Total.”

The material facts are not in dispute. The collision occurred at the “Cochrane Road crossing” in the city of Hamilton at about 5 o’clock in the afternoon on 13th February 1952. Authority to construct and maintain the highway known as the “Cochrane Road” across the railway track was given by the Board of Railway Commissioners for Canada on the 22nd October 1913, on an application by the Township of Saltfleet and thus the highway was “junior” to the railway. The crossing was constructed in accordance with “The Standard Regulations of the Board affecting Highway Crossings” and there was a “crossbuck” railway crossing sign at the north and at the south side of the crossing. There was no statutory provision and there was no order or regulation of the Board of Transport Commissioners or of its predecessor the Board of Railway Commissioners for Canada in force at the time of the collision, requiring any additional or special protection at the crossing. In particular, there was no order, regulation or statutory requirement limiting the speed of trains running over the crossing. There was in force a by-law of the City of Hamilton, duly approved by the Board of Railway Commissioners for Canada, which provided that: “No person shall blow or sound . . . the steam whistle of any locomotive . . . when such locomotive . . . is approaching any highway crossing in the City of Hamilton . . . except when absolutely necessary as a signal of danger”.

The train was running in a westerly direction and the motor vehicle was travelling southerly. At a distance of approximately 500 feet east of the crossing there is a curve in the railway line and an engineer of a westbound train cannot see the crossing until he comes around that curve. When the engineer of the train in question reached a point where he could see the motor vehicle involved in the collision, the train was running at 55 miles per hour (as fixed by a train speedometer) and it was not possible to stop the train in the distance between that point and the point of collision. Finally, I mention that both the driver of the motor vehicle and the respondent O’Hanley were residents in

the neighbourhood of the crossing and were very familiar with it.

The plaintiffs did not attempt at trial to establish that there was negligence on the part of the defendants by reason of the breach of any statutory provision or any order of the Board of Transport Commissioners or its predecessor. They rested their cases on an alleged breach of a common law duty which they maintained rested on the defendants by reason of special circumstances. Their cases and their arguments may be stated briefly as follows: By reason of special circumstances the appellant Ricker was under a duty at common law to reduce the speed of the train in question to such a rate and to have it under such control that when he reached the place where he could see the imminent danger of collision with the motor vehicle, he could then bring his train to a stop in time to avoid the collision. It was conceded freely and frankly in this Court by counsel for the respondents that if this Court is of the opinion that there was no special circumstance imposing a duty at common law on the defendants to take special precautions and care in the operation of the train before the collision occurred, then the actions brought by the plaintiffs must fail and be dismissed.

The special circumstances upon which counsel for the respondents rely were enumerated and I quote from my notes as follows:

- (1) the existence of a "short sight-line" at the crossing;
- (2) the existence of an "abrupt and sharp curve" of the railway line close to the crossing;
- (3) the existence of poles and vegetation obstructing or limiting the view of the train approaching the crossing;
- (4) the railway company's knowledge that the crossing was dangerous because it knew that there had been previous accidents there and it knew of petitions and efforts of many persons and of the City of Hamilton to obtain additional crossing protection;
- (5) the knowledge of the railway company, and in particular the appellant Ricker, that the crossing was dangerous because of an accident that happened there on 12th January 1952.

It is my opinion that none of the circumstances relied on by counsel for the respondents was a "special circumstance" giving rise to a common law duty on the part of the appellant Ricker to reduce the speed of the train and operate it in the manner insisted upon by counsel for the respondents. I do not attempt

to formulate a comprehensive definition or description of "special circumstances" which impose a common law duty on a railway and its employees to take special measures to avoid the danger at railway crossings. Illustrations of such special circumstances may be found in *Lake Erie and Detroit River Railway Company v. Barclay* (1900), 30 S.C.R. 360, and in *Montreal Trust Co. v. Canadian Pacific Railway Co.*, 61 O.L.R. 137, 33 C.R.C. 407, [1927] 4 D.L.R. 373, referred to in *Anderson v. Canadian National Railway Company*, [1944] O.R. 169 at 176, 56 C.R.T.C. 379, [1944] 2 D.L.R. 209. I refer also to *Colebourne v. Harrop et al.*, 29 O.W.N. 477, 32 C.R.C. 208, [1927] 1 D.L.R. 116; *Canadian National Railways v. Pomerleau*, [1931] S.C.R. 287, 37 C.R.C. 438, [1931] 1 D.L.R. 209; *Canadian Pacific Railway Company v. Rutherford*, [1945] S.C.R. 609, 58 C.R.T.C. 241, [1945] 3 D.L.R. 609, and *Schiffner et al. v. Canadian Pacific Railway Company*, 2 W.W.R. (N.S.) 193, 69 C.R.T.C. 34, [1951] 4 D.L.R. 172.

The matters of "sight lines" at the crossing and the location of the curve in the railway line in relation to the crossing are essentially matters within the purview of the Board of Transport Commissioners. It is within the exclusive jurisdiction of the Board, in the exercise of its powers, to inquire into such matters and thereafter to make such order as to the protection and safety of the public as it deems expedient. The Court cannot regard such matters as "special circumstances" and by reason thereof hold the railway liable for failure to take special precautions in the operations of its trains. The existence of poles and vegetation on the railway right-of-way did not obstruct the view of the train approaching the crossing after it was around the curve and did not restrict that view to any appreciable extent. A motorist approaching the crossing from the north, as in this case, would be able, by looking in a reasonably prudent way, to see the approaching train in time to avoid a collision. The poles and vegetation on the right-of-way were not a factor causing or contributing to the collision and cannot be regarded as a special circumstance. Finally, I am not satisfied that either the railway or the appellant Ricker regarded this crossing as an unusually dangerous one. It has been said with truth that all level railway crossings are dangerous, but neither the Board of Railway Commissioners nor its successor, the Board of Transport Commissioners, with full knowledge of the facts and conditions existing



at this crossing, deemed it necessary or expedient, prior to the time of the collision, to order a limitation on the speed of the trains running over the crossing, or that any other special measures be taken by the railway for the protection and safety of the public. It is proper to assume that before the collision the Board did not consider that there was any unusual danger at the crossing. There was nothing done by the railway or its employees to create a dangerous situation at that place and, in my opinion, the respondents have failed to show that there was any special circumstance or that there was any common law duty on the railway or on the appellant Ricker to take special precautions in the operation of the train involved in the collision. Therefore, in accordance with the views of counsel for the respondents, the judgment in each action should be set aside and both actions should be dismissed.

By reason of the admission of counsel and my conclusion in respect thereof, it becomes unnecessary to consider or discuss any of the other matters urged in support of the appeal.

It remains only to refer to an application made on behalf of each respondent in this Court to amend the respective statements of claim by adding thereto two new paragraphs as follows:

"The defendant company negligently and carelessly failed to maintain its right-of-way in that it allowed vegetation and high grass to grow thereon, all of which had the effect of restricting the sight line from the level crossing approach to the east."

"The defendant company negligently and carelessly did permit and allow its trains to operate at a high rate of speed at the Cochrane Road level crossing well knowing that special circumstances there existing rendered high speed dangerous."

In respect of the first of these paragraphs counsel for the appellants takes strong objection to the proposed amendment on the ground that the defendants did not attempt at trial to meet such an allegation; that if it had been made before or even during the trial, much relevant evidence could have been adduced by the defendants and that, in any event, it appears plainly that the condition of vegetation and high grass on the right-of-way had no causal connection whatsoever with the collision.

The second paragraph is objectionable because it omits particulars of the "special circumstances" referred to, but even more so because the evidence does not disclose any "special circumstances".

The applications to amend the statements of claim should be dismissed but without any costs thereof.

The appeals should be allowed with costs. The appellants are entitled also to the costs in each action. There should be one counsel fee only in this court and one counsel fee at trial and each respondent should bear one-half of those counsel fees.

*Appeals allowed with costs and actions  
dismissed with costs.*

*Solicitors for the plaintiff Alexander, respondent: Griffin, Parker & Weatherston, Hamilton.*

*Solicitors for the plaintiff O'Hanley, respondent: White & Paikin, Hamilton.*

*Solicitors for the defendants, appellants: Soule & Soule, Hamilton.*

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[FERGUSON J.]

Donaldson v. Lapp.

*Easements — Easement Arising by Implication of Law on Severance — Right of Drainage — Effect of Non-registration of Deed — Subsequent Purchaser for Value without Notice — The Registry Act, R.S.O. 1950, c. 336, ss. 74, 75.*

L, the owner of lots 23 and 24, constructed a wall and ditch to drain off water from lot 24 on to lot 23. L. sold lot 24 to the plaintiff under an agreement for sale, which was not registered. The defendant later bought lot 23, having no knowledge of the existence of the wall and ditch, and registered his deed. When he discovered them he built a wall blocking the flow of water on to his land. The plaintiff sued for an injunction.

Held, the plaintiff was entitled to an injunction. Being in possession, she was entitled to exercise all the rights of ownership. *Burroughs v. Oakley* (1819), 3 Swan. 159, applied. Her easement arose by implication of law from the severance, and not from any implied grant. The easement was therefore not capable of registration, and accordingly the non-registration of the plaintiff's agreement, or notice thereof, did not give the defendant's deed priority; ss. 74 and 75 of The Registry Act had no application. *Israel v. Leith* (1890), 20 O.R. 361; *Polden v. Bastard* (1865), L.R. 1 Q.B. 156; *Birmingham, Dudley and District Banking Company v. Ross* (1888), 38 Ch. D. 295, applied; *Smith v. Thornton* (1922), 52 O.L.R. 492, distinguished.

The injunction, however, should require removal of the wall only in so far as it blocked the drain previously constructed. The defendant was entitled to prevent the flow of surface water from lot 24 on to his lot. *Township of West Flamborough v. Pretuski* (1930), 66 O.L.R. 210, applied.

AN ACTION for an injunction and damages.

10th and 11th December 1952. The action was tried by FERGUSON J. without a jury at Welland.

*C. Beccario*, for the plaintiff.

*Fraser Raney, Q.C.*, for the defendant.

5th February 1953. FERGUSON J.:—This action involves, in a somewhat new form, the question raised in the year 1890 in *Israel v. Leith*, 20 O.R. 361, namely, the validity of an unregistered right of drainage as against a purchaser for value without notice of the servient tenement. Lawrence and Cordelia Lawson owned lots 23 and 24, plan 938, Mohawk Point, in the township of Sherbrooke, in the county of Haldimand. The lots adjoin, lot 23 being to the north. Lot 24 has a 60-foot frontage on Lake Erie and lot 23 has a 50-foot frontage. They are about 289 feet in depth, going over the top of an embankment which is towards the west end of the lots. On the 12th November 1947 the Lawsons sold lot 24 under an agreement for sale to the plaintiff, Henrietta Donaldson. The agreement for sale was not registered and is still not registered, and at the date of the trial there was a balance of the purchase-price owing by Mrs. Donaldson of some \$300 to \$400. There has as yet been no conveyance of the legal estate to the plaintiff.

On the 28th June 1949 the Lawsons sold lot 23 to Joan Walsh. That deed was duly registered in the Registry Office for the County of Haldimand on the 20th June 1950 as no. 1461. On the 19th June 1950 Joan Walsh sold lot 23 to the defendant Girvin Lapp and that deed was duly registered on the 3rd July 1950 as no. 1462. At the time the Lawsons sold lot 24 to the plaintiff there was a cottage erected on the lot. There is now a cottage on lot 23 but the evidence does not make it clear when it was built. Behind the cottages there is the bank which I mentioned; it begins to rise some 15 or 20 feet west of the cottages; it is wooded, and above the bank to the west of the two lots in question are fields. Directly behind the plaintiff's cottage, coming down the bank, is a small gully or depression in the ground through which water runs during heavy rains, particularly in the fall, and through which the water from the melting snow drains off the fields above the bank. It is in no sense a natural watercourse. As this gully is directly behind the cottage on lot 24, the water coming down it, if not diverted, would flow under the cottage. To avoid this the Lawsons about the year 1940 built a concrete wall across the gully about half-way up the bank and dug a small ditch from the southerly end



of the wall obliquely down the bank to and on to lot 23. Since the Donaldsons have taken possession of lot 24 they have found it necessary to repair the concrete dam which had cracked and to build earth around it, but it is essentially in the same condition, as is the ditch, as when originally constructed by the Lawsons.

When the defendant purchased lot 23 from Mrs. Walsh, who had purchased it from the Lawsons some two years after the plaintiff purchased lot 24, he did not see the dam or the ditch, nor was he told of the same. He knew that Mrs. Donaldson was the owner of lot 24 but did not know the nature of her title. He did not have actual notice of the easement or the legal right to the same. He discovered the ditch in the fall of 1950. He dug a small ditch on the plaintiff's property to divert the water from his own property, which had the effect of displeasing the plaintiff considerably, with the result that the defendant consulted his solicitors, and in the year 1951 he built a cinder-block wall of varying heights, 61 feet 1 inch long, roughly parallel to the lot-line, at the westerly end  $7\frac{1}{2}$  inches to the north of the lot-line and at the southerly end 1 foot  $1\frac{1}{2}$  inches north. The wall has the effect, so it is said, and I so find, of diverting the water back again on to the plaintiff's lot. This action is brought for an injunction restraining the defendant from diverting and continuing to divert the water over the plaintiff's land and for damages.

The ditch and gully are described in the plaintiff's statement of claim as a natural watercourse. The gully is in no sense a natural watercourse and from the dam down the bank it is merely a ditch of varying depth not more than 2 to  $3\frac{1}{2}$  feet at any point. There was a good deal of conflict in the evidence as to whether this ditch actually crossed the line between the two lots. The plaintiff's evidence did not put the end of the ditch more than 2 or 3 feet over the line. The defendant contended that the ditch terminated 2 or 3 feet short of his line in a shallow basin which had perhaps been dug in the ground. Whether the ditch does go 2 or 3 feet on to lot 23 or terminates 2 or 3 feet short of it, to my mind does not much matter, because its effect is to collect the surface-water from above into a channel and pour it over the lot-line on to lot 23.

I find as a fact that this was its effect at the time the Lawsons sold lot 24 to the plaintiff.

The plaintiff's contention is that her position is as high in law as if the legal estate had been conveyed to her; that when the Lawsons sold to her in 1947 there was a severance and that the agreement and her possession gave her a title—enforceable not only against her vendor but against all subsequent purchasers of lot 23—to all those continuous and apparent easements which are necessary to the reasonable use of the property granted, and which at the time of the grant were used by the Lawsons, the owner of the entirety, for the benefit of the part agreed to be sold to the plaintiff. The right of drainage was such a right. It is contended under the authority of *Israel v. Leith, supra*, that the right to drain the water from lot 24 to lot 23 was a legal right which did not require registration and that it is good as against the subsequent purchaser whether it is registered or not. It is contended that this is one of the easements that may arise from severance of the tenement and that even under the present Registry Act, R.S.O. 1950, c. 336, an easement created by severance of a tenement, not being capable of registration, is not within the Act and is not defeated by subsequent dealings.

I do not think the defendant can gain any comfort from the fact that the plaintiff is not seized of the legal estate. Mrs. Donaldson, being in possession, is entitled to exercise all ordinary acts of ownership over the property sold to her. The very purpose of going into possession is to act as the owner: *Burroughs v. Oakley* (1819), 3 Swan. 159 at 170, 36 E.R. 815. Possession has always been regarded as a good title against all the world but the owner: Armour on Real Property, 2nd ed. 1916, p. 288.

It is admitted by counsel for the defendant that if the plaintiff had registered her agreement for sale it would not be open to him to argue that she did not have the right of drainage as against the defendant, but he says that ss. 74 and 75 of The Registry Act, which make an unregistered deed void as against a subsequent registered deed unless there has been actual notice of the prior instrument by the party claiming under the prior registration, make the agreement for sale void as against the defendant. He contends that the right of drainage comes about by implied grant. The implied grant came into being by virtue

of the agreement for sale, and although the implication could not be registered, the deed which brought it into being must be registered, and as the deed which brought it into being is not registered, the subsequent registered deed takes priority. This is the argument for the defendant.

It appears to me that the point made by the defendant was argued in *Israel v. Leith* and rejected by the Divisional Court, for it was there contended that the deed, the instrument which brings the easement into being, can be registered, and therefore The Registry Act applied. Street J., delivering the judgment of the Divisional Court on appeal from the judgment of Rose J., said: "The Registry Act requires instruments affecting lands to be registered; originally it did not interfere with rights, legal or equitable, arising otherwise than by instruments capable of being registered: *Harrison v. Armour*, 11 Gr. 303."

In the earlier case of *Carter v. Grasett* (1888), 14 O.A.R. 865, reversing 11 O.R. 331, there was a difference of opinion in the Court of Appeal, two of the judges being of the opinion that such an easement arose by virtue of R.S.O. 1887, c. 105, s. 4, by express grant, while Burton and Osler JJ.A. thought it arose by implied grant.

Street J. in *Israel v. Leith* thought it unnecessary to resolve the difference of opinion because, in his view, if an easement arose by implied grant it was not affected by The Registry Act, and if it arose by express grant registration of the deed of the dominant tenement, which it was contended expressly granted the easement, having regard to the description contained therein, was sufficient registration of the easement. In either view the easement was good as against the servient tenement.

I think the defendant's argument is unsound. It is the severance of the entirety and not the deed that creates the easement. The easement is a legal right arising from the fact of severance. It is true that without the deed there would be no severance but without the severance there would be no easement.

In *Polden v. Bastard* (1865), L.R. 1 Q.B. 156, Erle C.J. said: "... it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant".



I agree with the statement made in *Armour on Titles*, 4th ed. 1925, p. 240: “. . . easements that are not apparent may arise from severance of a tenement”. And at p. 274: “And even under the present registry Act an easement created by severance of a tenement, not being capable of registration, is not within the Act, and is not defeated by subsequent dealings.”

In *Birmingham, Dudley and District Banking Company v. Ross* (1888), 38 Ch. D. 295, Cotton L.J. at p. 308 said: “By an implied obligation or an implied right I mean this: an obligation or right arising not from the express words of an instrument, nor from that which, having regard to the circumstances, must be considered the true meaning and effect of the words in the instrument; but that obligation or that right which results from the position into which the parties have placed themselves by the contract. For instance, where one man grants to another a house, then *prima facie* he cannot interfere with that which he has granted; there is an implied obligation on him not to interfere with that which he has granted; namely, the house, and enjoyment of the house. That obligation arises, I repeat, not from any interpretation of the conveyance, but from the duty which is imposed on the grantor in consequence of the relation which he has taken upon himself towards the grantee.”

Bowen L.J., speaking of the obligation on the grantor not to derogate from his own grant, said at p. 314: “It is not an obligation which arises simply from the interpretation of the deed as read by the light of the circumstances outside. It is a duty that arises from the outside circumstances having regard to the relation of grantor and grantee which the deed creates. Supposing you take the deed alone, no amount of construction could evolve from the deed itself the protection which the grantee of the deed desires. It does not appear from the deed that the grantor had the power of giving the protection which is necessary for the enjoyment of that which he grants; it is only by looking outside the deed that you see that such a power of protection on the part of the grantor in favour of the grantee exists.”

I conclude that the plaintiff's right of drainage is one arising by implication of law from the circumstances and is not capable of registration, and that therefore non-registration of the agreement for sale does not give the defendant's deed

priority. I referred to the same principle in *Fries v. Fries et al.*, [1950] O.W.N. 661.

The defendant relied on the case of *Smith v. Thornton* (1922), 52 O.L.R. 492, where a joint owner sold lot 38 with a verbal agreement for a joint right of way over lots 39 and 38. The right there contended for arose by express verbal grant and not by implication.

An attempt on the part of the defendant to block off the drain in question is a derogation from the grant made by the defendant's predecessor in title, and so far as the defendant's wall interferes with or blocks off the drain it must be removed. It does not follow, however, that the defendant's wall in its entirety must be removed; he is entitled to prevent the surface-water on lot 24 from flowing on to lot 23: *Township of West Flamborough v. Pretuski*, 66 O.L.R. 210 at 213, 217, [1931] 1 D.L.R. 520.

There will be judgment against the defendant for an injunction restraining him from interfering with or stopping the flow of water in the drain in question. The defendant must pay the costs of the action. No damage to the plaintiff was proved.

It is a great pity that the litigants could not have been prevailed upon to settle their differences by the construction of a small drain to take away the water which they both find so troublesome, particularly in view of the fact that it might have been done for a small sum of money in comparison with the costs of this expensive litigation, which in the result must be unsatisfactory.

*Injunction granted with costs.*

*Solicitors for the plaintiff: Flett & Beccario, Welland.*

*Solicitor for the defendant: Fraser Raney, Dunnville.*

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## [COURT OF APPEAL.]

## Re Smith.

*Executors and Administrators — Compensation — Determination of Adequate Amount — Allowance for Special Responsibility in Watching Investments — The Trustee Act, R.S.O. 1950, c. 400, s. 60(3).*

A testator, who died in 1910 leaving an estate consisting largely of shares in one company, advised his executors to continue that investment. The shares increased greatly in value, and were still held by the trustee 40 years after the testator's death. The trustee presented its accounts for a three-year period ending in 1952, during which period the market value of the assets in its hands increased from about \$1,636,000 to \$2,018,000. With its accounts the trustee presented a statement of proposed compensation totalling \$10,932.71 and made up of percentages on receipts and disbursements, together with a fee for care and management of the estate computed on the basis of one-tenth of 1 per cent. per annum on the average market value of the assets throughout the period. The Surrogate Court Judge allowed compensation of \$4,000 as an "overall figure". The trustee appealed.

*Held*, although the Court was loath to interfere with compensation allowed by an experienced Surrogate Court Judge, it should do so in this case, since the amount awarded, while it would be fair and reasonable to cover the receipts, disbursements and investments made by the trustee, was grossly inadequate if it was intended also to cover the care and responsibility of the trustee in relation to the shares, which involved the watching of this large investment with a view to deciding whether it should be realized, and, if so, when. A reasonable compensation for this care and responsibility (which should not be arrived at on a percentage basis, or on the basis of a management fee) would be not less than \$1,000 per annum, which would mean an addition of \$3,000 to the \$4,000 allowed by the Surrogate Judge. Looking at the compensation as a whole, a total of \$7,000 for a three-year period was fair and reasonable in so large an estate.

AN APPEAL by the trustee under the will of Frank Smith, deceased, from an award of compensation made by Shaunessy Sur. Ct. J., of the Surrogate Court of the County of Lambton.

3rd February 1953. The appeal was heard by PICKUP C.J.O. and HOPE and F. G. MACKEY JJ.A.

*J. D. Arnup, Q.C.*, for the trustee, appellant: The will contained a direction by the testator to retain the shares of Imperial Oil stock at its discretion. During the three-year period covered by these accounts the bulk of the estate was tied up in securities of this company. It was a period of fluctuation, and the market values of the stock held by the trustee in the three years were \$1,636,000, \$2,287,444 and \$2,018,000. An additional allowance for the care and responsibility imposed on the trustee in connection with these shares would be appropriate, and I submit that one-tenth of 1 per cent. on the value of the shares in each year would be reasonable. [MACKEY J.A.: Did the trustee sell any of the Imperial Oil stock?] Not during this period. There have been substantial capital distributions over



the years, and the estate has increased more than six times in value since 1910. [PICKUP C.J.O.: Your point is that there was a constant responsibility on the trustee, and that sooner or later the time might come when these shares should be realized?] Yes. I submit that on the percentage figure suggested by me a total fee of \$10,000 would be appropriate. [HOPE J.A.: Is this the type of estate in which a management fee is allowed?] It is not the usual case for a management fee. The usual case for a management fee is one in which there is a large portfolio of investments to be watched or a property or a business to be managed, or where the trustee holds all the shares in a privately-owned company. In the case at bar the trustee was constantly keeping this one stock under its supervision. [PICKUP C.J.O.: Where an estate consists solely of investments, and the trustee must try to keep a proper balance, is it not customary for a management fee to be allowed?] Yes. We should be compensated for our care and responsibility. It is true that we had only one stock to look after, but we ask only one-tenth of 1 per cent., instead of the more usual one-fifth.

[PICKUP C.J.O.: Can you demonstrate that the Surrogate Court Judge allowed nothing for care and management?] I cannot definitely say he did not, but it would look as if he did not. He gave no reasons. If he did make any such allowance, it was grossly inadequate. [PICKUP C.J.O.: If there was no allowance for care and management, would that constitute an error in principle?] I submit so.

*D. V. Hambling*, for Homer Smith, respondent: The trustee must show real and exceptional services to justify a management fee: Widdifield on Executors' Accounts, 4th ed. 1944, p. 426; *Re Cauchon*, [1952] O.W.N. 335, [1952] 2 D.L.R. 722.

*A. H. Robertson*, for the Official Guardian, respondent: The Surrogate Court Judge awarded \$4,000 as an "overall" figure. No error in principle has been shown by the appellant, and there should therefore be no interference with the award.

*L. H. Snider, Q.C.*, for the Public Trustee, respondent: The trustee was amply compensated so far as its income receipts and disbursements are concerned. There must be an extraordinary service to justify a fee for care and management. It is fair to assume that the Surrogate Court Judge took into consideration all of the items set out in the trustee's memorandum of proposed

compensation, and there is nothing from which it can be said that there was any error in principle. If there is no error in principle and the amount awarded is approximately right, this Court should not interfere.

*J. D. Arnup, Q.C.*, in reply.

*Cur. adv. vult.*

6th February 1953. The judgment of the Court was delivered by

PICKUP C.J.O.:—This is an appeal by the Canada Trust Company from that part of the order of the Judge of the Surrogate Court of the County of Lambton, dated 8th December 1952, which fixed the compensation of the trustee at the sum of \$4,000. This compensation covers the period from 15th September 1949 to 26th August 1952.

The trustee presented to the learned Surrogate Judge a statement of proposed compensation totalling \$10,932.71. This was made up by taking a percentage of 2 per cent. on capital receipts, a percentage of 1½ per cent. on that portion of the income receipts which consisted of dividends on shares of Imperial Oil Limited, and 2½ per cent. on other income, plus a percentage of 2½ per cent. on income disbursements. To this was added in the statement presented by the trustee a fee for care and management of the estate based upon the average market value of the assets throughout the period, and this care and management fee was computed at the rate of one-tenth of 1 per cent. per annum. This Court has not before it any reasons for judgment of the learned Surrogate Judge, nor have we any information as to how the Surrogate Judge arrived at the figure of \$4,000, other than the statement of counsel that it was "an overall figure" fixed by the Surrogate Judge.

It was suggested at the opening of the argument of the appeal that the matter might be referred back to the Surrogate Judge in order that evidence might be taken, but after consideration of that suggestion it did not appear that it would be of much assistance to the Court to refer the matter back to the Surrogate Judge, because counsel for the trustee does not contend that such reference back would show special services rendered by the trustee beyond what appears, or should be inferred, from the accounts filed and the carrying out of the duties of the trustee

under the will, which is before the Court. Such reference back would not show any detail as to time occupied or details of services rendered, beyond general statements showing that the trustee had duly performed the duties indicated by the accounts filed, and had at all times watched and guarded the large interest of the estate in the Imperial Oil shares which have been retained since the death of the testator as an investment of the estate.

The accounts of the trustee disclose that the only capital transaction during the period was the sale by the trustee of certain Imperial Oil rights; that the income receipts during the period consisted almost entirely of half-yearly dividends received by the trustee from Imperial Oil shares which were part of the estate at time of death; that the income disbursements over the period are largely semi-annual disbursements to one named beneficiary and payments of income tax. We are informed by counsel that the market value of the assets in the trustee's hands at 26th August 1950 was approximately \$1,636,000, at 26th August 1951 approximately \$2,287,000, and at 26th August 1952 \$2,018,000. The assets are mainly Imperial Oil shares, although there appear to be other investments made by the trustee which, at the end of the period to which the accounts are made up, amounted to approximately \$99,000. The trustee, in addition to the shares of Imperial Oil Limited has, since the death of the testator, held 20 shares of Lambton Loan & Investment Company, valued at \$2,300.

Under the terms of the will the testator recommended and advised his executors to continue his investment in Imperial Oil Company Limited, stating that he regarded it as an excellent investment. The testator died in 1910 and the trustee has continued to hold the shares of Imperial Oil Company Limited, which are now represented by 55,592 shares of Imperial Oil Limited. There has been a great increase in value of the Imperial Oil shares since the testator's death, and the change in market value of the assets of the estate already referred to is in reality a change in market value of the Imperial Oil shares. It is conceded that the trustee, throughout the period in question, had the responsibility of watching this large investment and deciding whether or not the shares should be realized, and, if so, when.

On the argument of the appeal counsel for Mr. Homer Smith, the beneficiary entitled to income under the will, suggested that



if the matter were considered on a basis of percentages upon receipts and disbursements, he would concede that a percentage of  $1\frac{1}{2}$  per cent. on capital receipts,  $1\frac{1}{2}$  per cent. on income receipts consisting of Imperial Oil dividends,  $2\frac{1}{2}$  per cent. on other income receipts, and  $1\frac{1}{2}$  per cent. on income disbursements, would be fair. These figures would amount to a total of \$3,778.70, but would not appear to allow anything to the trustee for the care and responsibility of the trustee in connection with the shares of Imperial Oil Limited, or for its services in respect of investments made by the trustee.

This Court is always loath to interfere with compensation allowed by an experienced Surrogate Judge, and the Surrogate Judge in this case is an experienced one, but the Court of Appeal should interfere if there is any error in principle, or if, in its opinion, the amount allowed is grossly insufficient or excessive. In this case I do not see how the learned Surrogate Judge could arrive at a figure as low as \$4,000, as total compensation for the whole period, without either erring in principle or erring in amount to such an extent that the error in amount should not be permitted to stand. I think the amount allowed by the Surrogate Judge would be fair and reasonable to cover the receipts and disbursements, and also the investments made by the trustee, but I think it would be grossly inadequate if it were intended also to cover the care and responsibility of the trustee in relation to the Imperial Oil shares. I would, therefore, add to the amount allowed by the Surrogate Judge reasonable compensation for the care and responsibility in relation to the Imperial Oil shares. I do not think that that should be arrived at on any percentage basis, or on the basis of a management fee, and I do not think it should be less than \$1,000 per annum, having regard to the large value of the estate and the responsibility involved. This would mean an addition of \$3,000 to the sum of \$4,000 allowed by the Surrogate Judge, and, looking at the compensation as a whole, I think that a total of \$7,000 for a three-year period, in an estate as large as this, would be fair and reasonable.

I would therefore allow the appeal and increase the compensation allowed from \$4,000 to \$7,000, and direct that the order of the Surrogate Judge be varied so as to reflect this change. I would leave the apportionment of the sum of \$4,000

as between capital and income as made by the Surrogate Judge, but would direct that the additional amount of \$3,000, allowed by this Court, be charged against capital. The costs of all parties to the appeal should be taxed and paid out of the capital funds of the estate. The appeal being by the trustee in respect of its own compensation, the costs of the trustee should not be on a solicitor-and-client basis.

*Appeal allowed.*

*Solicitors for the trustee, appellant: Donohue, Maher & Garrett, Sarnia.*

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[SCHROEDER J.]

### Ex parte O'Dell and Griffen.

*Extradition—Whether Extradition Treaty Exists with United States—Effect of The Statute of Westminster, 1931 (Imp.), c. 4.*

*International Law—Position of Canada in International Relations—The Statute of Westminster, 1931 (Imp.), c. 4—Pre-existing Treaties.*

The enactment by the Imperial Parliament of The Statute of Westminster, 1931, did not have the effect of abrogating the Ashburton treaty of 1842, entered into by Her Britannic Majesty on behalf of Canada as a part of the British Empire. Although Canada is fully entitled, since 1931, to negotiate treaties on her own behalf, and without reference to the Government of the United Kingdom, and to substitute some other extradition arrangement for the one now embodied in the Ashburton treaty, that treaty remains in full force and effect, and binding upon the signatories, including Canada, until some other arrangement is made.

*Extradition—Procedure—To What Extent Ordinary Criminal Procedure Imported into Extradition Proceedings—Adjournments—The Extradition Act, R.S.C. 1927, c. 37, ss. 9, 13—The Criminal Code, R.S.C. 1927, c. 36, ss. 679(1)(c) (as re-enacted by 1950, c. 11, s. 9(1)), 722(1) (as re-enacted by 1948, c. 39, s. 23).*

Section 13 of The Extradition Act does no more than provide in a general way how the hearing before an extradition commissioner shall be conducted, and does not introduce into those proceedings all the technicalities of ordinary criminal procedure. In particular, s. 679(1)(c) of The Criminal Code is not incorporated into extradition proceedings, and the commissioner will not lose jurisdiction if he adjourns the hearing for more than eight clear days, the prisoners remaining in custody throughout the period of the adjournment. *In re Collins* (1905), 11 B.C.R. 436 at 445; *Re Harsha* (1906), 11 O.L.R. 457 at 461, affirmed 42 C.L.J. 754, applied.

AN APPLICATION for a writ of habeas corpus following a committal for extradition to the United States of America.

3rd February 1953. The application was heard by SCHROEDER J. in chambers at Toronto.

*John Bowlby*, for the applicant O'Dell.

*J. G. White*, for the applicant Griffen.

*H. F. McCulloch, Q.C.*, for the State of New York, *contra*.

9th February 1953. SCHROEDER J.:—This is an application for the issue of a writ of habeas corpus and a writ of certiorari in aid thereof and for the discharge from custody of Maurice O'Dell and Walter Griffen, now lodged in the county gaol in the county of Wentworth, pursuant to an order of Mr. Justice Treleaven made on the 24th January 1953, committing the applicants to prison until surrendered to the State of New York or discharged according to law.

The applicants were arrested under a warrant issued by Mr. Justice Treleaven on 12th December 1952, on which date they were brought before him. They were remanded until 16th January 1953 for final hearing. The fugitives are under indictment in the State of New York on a charge of murder and evidence relating to the charge was presented at the hearing. Counsel for the fugitives conceded that there was sufficient evidence adduced before the learned judge to justify the order of committal and they base their claim to the relief which is now sought on two grounds, namely, (1) that there was no subsisting extradition treaty or convention between Canada and the United States of America on the date of the issue of the warrant of apprehension; (2) alternatively, that the fugitives having been remanded for a period of more than eight days, the learned judge who issued the warrant for committal was without jurisdiction and that the proceedings before him were null and void.

In support of the first ground, it is contended that the only treaty or convention in existence within the meaning of The Extradition Act of Canada, R.S.C. 1927, c. 37, is the Ashburton treaty of 1842, which was entered into between Her Britannic Majesty and the United States of America. This treaty not only provided for the delivery up to justice of persons charged with certain enumerated crimes committed within the jurisdiction of the signing powers, but was also entered into "to settle and define the boundaries between the possessions of Her Britannic Majesty in North America, and the territories of the United States; [and] for the final suppression of the African slave trade".

It is urged by counsel for the fugitives that since the enactment in 1931 of The Statute of Westminster, 22 Geo. V. (Imp.), c. 4, the Ashburton treaty ceased to have any validity in Canada; that Canada had only colonial status when that treaty was made,



but that since the enactment of The Statute of Westminster Canada has been an independent and self-governing nation. It is argued that while Her Majesty Queen Elizabeth II, the lawful successor of Her Majesty Queen Victoria, is the Queen of Canada as well as the Queen of Great Britain and other realms of the Commonwealth, the present relationship between the Crown and this country is completely different from the relationship which existed in 1842 when Canada was only a possession of Her Britannic Majesty in America and that consequently the Ashburton treaty, not being a treaty made by Her Britannic Majesty on behalf of Canada as a self-governing and independent nation, no longer has any force and effect.

It is undoubtedly true that since 1931 Canada has been independently represented in the United States and in other foreign nations by her own diplomatic representatives and has entered into treaties with foreign countries through her own ministers of state without reference to the Government of the United Kingdom, but I am quite unable to apprehend how it can be said that the enactment of The Statute of Westminster can possibly have the effect ascribed to it by counsel. The true relationship of the Crown to the various countries composing the British Commonwealth is set forth in the preamble of the statute, which reads:

“And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:”

Another purpose of the statute is set forth in the third clause of the preamble, which reads:

“And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:”

The statute then goes on to provide that The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of The Statute of Westminster by the Parliament of a Dominion. It is declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation. It is further provided that no Act of the Parliament of the United Kingdom thereafter passed shall extend or be deemed to extend to a Dominion unless it is expressly declared in that Act that the Dominion has requested and consented to the enactment thereof. These and other sections of the Act convey some idea of the purpose for which the statute was passed. Had it been intended that the Ashburton treaty or any other convention which had been entered into or any other statute which had been enacted by the Imperial Government or Parliament prior to this time, affecting Canada or any of its Provinces, should cease to have validity, one would expect to find express provision for it in The Statute of Westminster or in some other statute. There is nothing to prevent Canada from entering into a new treaty with the United States or substituting some other extradition arrangement for the one which is now embraced within the terms of the Ashburton treaty, but until that is done that treaty remains in full force and effect and is binding upon the signatories thereto, including Canada. Indeed it would be a startling and extraordinary thing if Canada and the United States had been without an extradition arrangement for a period of approximately twenty-two years. Many extradition proceedings have taken place during that period and it is rather astonishing, if this point has any merit in it, that it was not at least raised before this date. It would be rather surprising if it escaped the attention of the members of the Court of Appeal in *Re Insull*, [1934] O.W.N. 194, 61 C.C.C. 336, [1934] 2 D.L.R. 696, and of the eminent and learned counsel who were before the Court in that case. The application on this branch of the argument must fail.

I now turn to the second ground upon which this application is based.

Section 13 of The Extradition Act reads: "The fugitive shall be brought before a judge, who shall, subject to the provisions of this Part, hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a justice

of the peace, charged with an indictable offence committed in Canada." It is submitted that this section of necessity imports into the procedure under The Extradition Act ss. 679(1) (c) and 722(1) of The Criminal Code, R.S.C. 1927, c. 36.

Section 679(1) (c) as re-enacted by 1950, c. 11, s. 9(1), reads as follows:

"A justice holding a preliminary inquiry may in his discretion. . . .

"(c) adjourn the hearing of the matter from time to time, and change the place of hearing, if from the absence of witnesses, the inability of a witness who is ill to attend at the place where the justice usually sits, or from any other reasonable cause, it appears desirable to do so, and may remand the accused, if required, by warrant in Form 17: Provided that no such remand shall be for more than eight clear days, the day following that on which the remand is made being counted as the first day, but nothing herein contained shall be construed as prohibiting any adjournment for more than eight clear days in any case where the accused is on bail, and he and his surety or sureties and the prosecutor or complainant consent, or when the accused is remanded for observation under paragraph (f);".

Section 722(1) as re-enacted by 1948, c. 39, s. 23, reads as follows: "Before or during the hearing of any information or complaint the justice may, in his discretion, adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party or parties, or of their respective counsel, solicitors or agents then present, but no such adjournment shall, except with the consent of both parties, be for more than eight days."

I have no hesitation in rejecting this argument. Section 13 does no more than to provide in a general way for the manner in which the hearing before the judge presiding over the extradition proceedings is to be conducted and in s. 16 of The Extradition Act provision is made for the reception of depositions taken in the foreign State. It does not follow that the technicalities of our criminal procedure have been introduced into the proceedings to be conducted before the tribunal designated by s. 9 of The Extradition Act. This view is substantiated by what was said by Duff J., as he then was, in *In re Collins* (1905), 11 B.C.R. 436 at 445, 10 C.C.C. 80, 2 W.L.R. 164, where, after quoting from



*In re Belencontre*, [1891] 2 Q.B. 122 at 144, that learned jurist stated:

"The view of the Queen's Bench Division, in the case referred to—the view twice repeated by the Supreme Court of the United States in the cases I am about to read from—is that the technicalities of the criminal practice should not be allowed to smother or encumber the administration of the procedure prescribed by these modern statutes for the purpose of carrying out the obligations we have assumed under this vastly salutary international arrangement.

"The language of Mr. Justice Brown, delivering the judgment of the Court in the case of *Grin v. Shine* (1902), 187 U.S. 181 at p. 184, is as follows: 'These treaties should be faithfully observed, and interpreted with a view to fulfil our just obligations to other powers without sacrificing the legal or constitutional rights of the accused. In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such to put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, viz.: submit themselves to the laws of their country. Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way of faithful discharge of our obligations. Presumably at least, no injustice is contemplated; and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community is rather to be welcomed than discouraged.'

"In *Wright v. Henkel* (1903), 190 U.S. 40 at p. 57, Chief Justice Fuller, delivering the judgment of the court, used this language: 'Treaties must receive a fair interpretation according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of

criminal proceedings are applicable to proceedings in extradition only to a limited extent.'

"That is the principle which I apply here."

To the same effect is the judgment of Boyd C. in *Re Harsha* (1906), 11 O.L.R. 457 at 461, 11 C.C.C. 62 (affirmed by the Judicial Committee of the Privy Council, *sub nom. Harsha v. United States of America*, 42 C.L.J. 754), where the learned Chancellor stated: "The Court would fail in its duty and the whole purpose of the extradition comity would be frustrated, if a man duly charged with an extraditable crime, and so far as *prima facie* evidence goes apparently guilty of the crime charged, could escape by technicalities and subtleties that are discreditable enough in ordinary criminal law without being imported into extradition procedure."

Even if the applicants' contention upon the second ground advanced in support of this application were well-founded, I would be prepared to hold that, in the circumstances disclosed in the record of the proceedings before Mr. Justice Treleaven, they and counsel who then represented them consented to the adjournment for more than eight days which, after all, is a matter of procedure that may be waived.

For the reasons stated, the application for an order directing the issue of a writ of habeas corpus herein and a writ of certiorari in aid and for the discharge of the prisoners from custody, is dismissed.

*Application dismissed.*

*Solicitor for the applicant O'Dell: John Bowlby, Hamilton.*

*Solicitors for the applicant Griffen: White & Paikin, Hamilton.*

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[GALE J.]

## Re Mills.

*Companies and Corporations—Dividends—Stock Dividend, Redeemed by Company Immediately or after Interval—Use of Undistributed Surplus of Company—Whether Proceeds Income or Capital in Hands of Trustee-shareholder—The Income Tax Act, 1948 (Can.), c. 52, s. 95A(1), as enacted by 1950, c. 40 s. 32.*

When a company distributes accumulated profits to its shareholders in the form of a stock dividend, the shares being redeemed out of the surplus on hand, the question whether those profits reach the shareholders as income or as capital is to be answered not only according to the form of the transaction but by determining its substance. If the company has decided to devote the accrued income to capital purposes, any shares issued by reason of that decision, or the proceeds thereof, will be regarded as a capital accretion by the shareholders no matter what process is employed by the company to achieve its object. If, on the contrary, the company resolves to pass the surplus income over to its shareholders rather than to blend it into the capital fund, the shareholders will be deemed to receive income and not capital. *Bouch et al. v. Sproule* (1887), 12 App. Cas. 385; *Re Fleck*, [1952] O.R. 113, affirmed [1952] O.W.N. 260, applied. This intention of the company is essentially a matter of fact, and must be determined as at the inception of the plan, and if it is clear that at that time the company's intention was to convey these profits to its shareholders in such a way that they would not be subject to income tax on receipt of them, it makes no difference whether the redemption of the shares is effected immediately after they are issued or only after an interval of some months. *Aykroyd v. Commissioners of Inland Revenue*, [1952] 2 All E.R. 665, referred to.

A MOTION by the trustee of the estate of Stanley Mills, deceased, for the opinion, advice and direction of the Court.

1st and 2nd December 1952. The motion was heard by GALE J. in Weekly Court at Toronto.

*W. E. P. DeRoche, Q.C.*, and *R. S. Johnston*, for the trustee, applicant.

*J. D. Arnup, Q.C.*, for branches of the Victorian Order of Nurses.

*L. H. Snider, Q.C.*, for the Public Trustee.

16th February 1953. GALE J.:—After reading, and in most instances rereading, all the cases cited, and many others, I have come to the conclusion that the questions presented to the Court in this matter ought to be answered in such a way as to indicate that the sums received by the trustee upon the redemption of the preference shares of Mills Bros. Limited, to which detailed reference will be made later, represent income in the hands of the trustee for the purpose of administering the trusts involved. My decision flows from a conviction that this case is governed by the effect of the judgments in *Re Fleck*, [1952] O.R. 113,



[1952] C.T.C. 196, affirmed [1952] O.W.N. 260, [1952] 2 D.L.R. 657, [1952] C.T.C. 205, which to-day express the law of this Province upon the subject-matter of this motion.

The late Stanley Mills died on the 20th January 1938 and shortly thereafter letters probate of his last will and testament and codicil were granted to the above-mentioned trust company, the executor and trustee therein named.

At the date of his death the late Mr. Mills was the owner of 3,331 shares of the capital stock of Mills Bros. Limited, a private company incorporated under the Dominion Companies Act. Those shares had a par value of \$100 each and formed part of the total issued and fully-paid share capital of the company consisting of 10,000 shares. Under the provisions of the will the trust company was directed to hold those shares in trust to pay out of the income arising therefrom an annuity in favour of the widow of the testator and to pay the remainder of such income in designated proportions to several branches of the Victorian Order of Nurses. The will also directed that in certain events which have not yet come to pass, and may never occur, the Victorian Order of Nurses would cease to be entitled to receive the income, which would thereafter be payable to other charitable institutions.

The trustee was empowered to hold the shares of Mills Bros. Limited so long as it deemed advisable and in the exercise of such discretion those shares have been retained.

By the end of 1949 the company had on hand accumulated surplus profits in an amount in excess of \$500,000. On the 20th December 1950 a special meeting of the shareholders of Mills Bros. Limited was held, at which the shareholders approved of a resolution of the directors that the company elect to pay a tax of 15 per cent. on its undistributed income as at the end of its 1949 taxation year under the provisions of s. 95A(1) of The Income Tax Act, 1948 (Can.), c. 52, as enacted by 1950, c. 40, s. 32. Accompanying the notice calling such meeting was the following letter signed by the president of the company, and dated 1st December 1950:

"To the Shareholders of Mills Bros. Limited:

"I enclose this letter with a Notice of a Special General Meeting of the Shareholders of the Company so that you may be apprised of the actions taken by your Board requesting the

approval of the Resolution which was passed by the Directors of this Company on the Twenty-Third day of November, 1950.

"In March, 1950, an amendment to the Income Tax Act was passed (Sec. 95A) which provides that Companies such as ours may pay a Special Tax of 15% on undistributed income on hand at December 31st, 1949.

"In the intervening months there has been a war in Korea and an accelerated rearmament program in Canada and the U.S.A. with the result that the general feeling is that taxes are going to be heavier to support these expenditures.

"Specifically the present privileges extended to Private Companies within the past year to get out their undistributed surpluses, may become more expensive or withdrawn entirely at the next budget. The terms of such relief at present are not as generous as those that were formerly available and the present relief may well be supplanted by more stringent terms in the near future. Any such change in that direction could be very expensive to the shareholders of this Company.

"The plan you are asked to approve will be for the Company to pay the 15% tax by December 31st, 1950, and thus qualify the Company for future tax free distributions.

"We feel sure you will be gratified to know that the physical well-being of your Company is such that we can afford to take advantage of such a tax privilege as this without detriment to current operations. We consider it as good news to our shareholders and which will be favourably received.

"Will you kindly return your proxy form in case you are unable to attend."

That letter is of prime importance in a consideration of this matter.

Pursuant to the resolution of the 20th December 1950 the company did pay the said tax of 15 per cent., amounting to \$126,300.59, on its undistributed income of \$842,003.94, calculated in accordance with the provisions of s. 73A(1) of The Income Tax Act, as enacted by 1950, c. 40, s. 28, and the company was then left with tax-paid accumulated income as of the end of its 1949 fiscal year of \$715,703.35.

Subsequently that accumulated income was dealt with by the company. A notice in this form was sent out to the shareholders of the company on 15th May 1951:

## “NOTICE

### “SPECIAL GENERAL MEETING OF SHAREHOLDERS

“PLEASE take notice that a Special General Meeting of the shareholders of MILLS BROS. LIMITED will be held on the 5th day of June, 1951, at 10 a.m., E.D.S.T., at the head office of the Company, Imperial Building, 25 Hughson Street South, Hamilton, Ontario.

“The business before the meeting will be:

“(a) To consider and if deemed advisable sanction and confirm By-law No. 23 of the Company passed by the Directors on the 8th day of May, 1951, authorizing an application for Supplementary Letters Patent subdividing the authorized and issued ten thousand (10,000) shares of the capital stock of the Company having a par value of One Hundred Dollars (\$100.00) each into one hundred thousand (100,000) shares having a par value of Ten Dollars (\$10.00) each and increasing the capital of the Company by the creation of one hundred thousand (100,000) four per centum (4%) non-cumulative redeemable preference shares having a par value of Ten Dollars (\$10.00) each,

“(b) To consider and if deemed advisable sanction and confirm By-law No. 24 of the Company passed by the Directors on the 8th day of May, 1951, being a by-law empowering the Directors of the Company to declare stock dividends and to issue therefor shares of the Company fully paid and non-assessable, and

“(c) To transact such other business as may properly come before the meeting.”

At the special general meeting of the 5th June 1951 the company did two things. In the first place the shareholders sanctioned By-law 23 of the company passed by its directors authorizing an application for supplementary letters patent subdividing the authorized and issued 10,000 shares of the capital stock of the company of a par value of \$100 each and increasing the capital of the company by the creation of 100,000 4 per cent. non-cumulative redeemable preference shares having a par value of \$10 each, and, secondly, the shareholders confirmed By-law 24 of the company passed by the directors which was in this form:



“BY-LAW No. 24

Being a by-law empowering the Directors  
to declare stock dividends.

“NOW THEREFORE BE IT ENACTED AND IT IS HEREBY ENACTED as by-law No. 24 of MILLS BROS. LIMITED (hereinafter called the ‘Company’) that:

FOR the amount of any dividend which the Directors may lawfully declare payable in money the Directors may declare a stock dividend and issue therefor shares of the Company fully paid and non-assessable.

“ENACTED this 8th day of May, A.D. 1951.”

On 30th July, 1951 supplementary letters patent were issued to the company pursuant to the application made under the first of the two last-mentioned resolutions.

Then on 23rd October 1951 the board of directors of the company passed the following resolution:

“RESOLUTION RE STOCK DIVIDEND

“WHEREAS By-law No. 24 which was passed by the directors on the 8th day of May, 1951, and was confirmed by the shareholders in meeting duly convened, authorizes the directors to issue fully paid shares for the amount of any dividend that the directors may lawfully declare payable in money;

“AND WHEREAS by supplementary letters patent bearing date the 30th day of July, 1951, the authorized capital of the Company was subdivided and increased as follows:—

“The capital stock of the Company shall be two million dollars divided into one hundred thousand four per cent non-cumulative redeemable preference shares and one hundred thousand common shares, all of the par value of ten dollars each;

“AND WHEREAS pursuant to the authority of said by-law the directors have decided to issue 71,564 of the preference shares authorized by the supplementary letters patent as fully paid and non-assessable shares as a dividend;

“NOW BE IT RESOLVED that a dividend be and the same is hereby declared on the issued shares of the common stock of the Company in the form of an issue of preference shares of the Company of an aggregate par value of \$715,640.00;

“BE IT FURTHER RESOLVED that in appropriating said shares to said dividend, \$715,640.00 of the tax paid undistributed income on hand of the Company standing on the books of the Company

be capitalized and appropriated to payment in full of said 71,564 preference shares appropriated for said stock dividend;

"BE IT FURTHER RESOLVED that contemporaneously with said appropriation and capitalization of said \$715,640.00 of said undistributed income, there be issued and allotted the said 71,564 preference shares of the Company of the par value of ten dollars (\$10) each as fully paid and non-assessable shares to the holders of record of the outstanding common shares of the Company in proportion to the shares held by them respectively at the close of business on the 31st day of October, 1951, said preference shares to rank for dividends from and after the 1st day of November, 1951;

"BE IT FURTHER RESOLVED that the Company take cognizance of any waivers filed by shareholders with respect to receipt of said stock dividend and appropriate and distribute any shares affected by such waivers among or to shareholders who have not filed any such waiver, so that persons holding qualification shares need not be obliged to receive and account for any shares to be issued as a stock dividend."

Following enactment of this resolution, there was subsequently issued by the company to the trustee of this estate a certificate (or certificates) for 23,840 4 per cent. non-cumulative redeemable preference shares of the company.

On the same day, namely, 23rd October 1951, the Board passed this resolution:

"RESOLUTION RESPECTING REDEMPTION OF PREFERENCE SHARES

"WHEREAS there are now issued and outstanding as fully paid and non-assessable 71,564 4% non-cumulative redeemable preference shares of the par value of ten dollars (\$10) each; and

"WHEREAS the Directors have declared a dividend on such 4% non-cumulative redeemable preference shares at the rate of 4% per annum from November 1st, 1951, for the period of one month, such dividend to be payable on December 1st, 1951, to the Shareholders of record as of the close of business October 31st, 1951; and

"WHEREAS it is expedient that 50,000 of such issued and outstanding 4% non-cumulative redeemable preference shares should be redeemed as hereinafter mentioned;

"NOW THEREFORE BE IT RESOLVED THAT THE Company do redeem, on the 1st day of December, 1951, 50,000 of its 4% non-

cumulative redeemable preference shares of the par value of ten dollars (\$10) each by payment for each of such shares of ten dollars (\$10) together with the sum of  $3\frac{1}{3}$  cents per share, being a dividend at the rate of 4% per annum for the period from November 1st, 1951 to the date fixed for redemption of the said shares; and that at least thirty (30) days' notice in writing be given to each of the persons who at the date of the giving of such notice are the registered holders of such shares, of the intention of the Company to redeem the same, such notice to be given by the Secretary of the Company in the manner, and containing the information, required by the provisions of the supplementary letters patent of the Company, and further that the redemption moneys be paid in accordance with such provisions;

"AND BE IT FURTHER RESOLVED that the officers of the Company be and they are hereby authorized to take all such steps and execute all documents which may be necessary or desirable for the purpose of effecting such redemption."

Later, on 15th January 1952, the directors of the company, by similar resolution, made provision for redemption of the outstanding redeemable preference shares on the 1st April 1952 and at the same time stipulated that the shareholders were also to be paid the sum of 30 cents per share by way of a dividend. Under the authority of the last two resolutions 16,655 of the preference shares issued to the trustee were called for redemption on the 1st December 1951, and the trustee, in exchange therefor, received \$167,105.16, and on the 1st April 1952 the balance of those shares were redeemed, at which time the trustee received the further sum of \$93,405.

The Court is asked for its advice upon these two questions:

"1. Whether upon the true construction of the said Will and in the events which have happened the sum of \$166,550.00, being the sum (exclusive of the amount representing accrued dividends) received by the Trustee upon the redemption of 16,655 4% Non-Cumulative Redeemable Preference Shares of Mills Bros. Limited which were issued and received as a stock dividend by the said Company to the Trustee, is income or corpus in the hands of the Trustee for the purpose of administering the said Trust.

"2. Whether upon the true construction of the said Will and in the events which have happened the remaining 7,185 4% Non-Cumulative Redeemable Preference Shares of Mills Bros. Limited,



which were issued and received as a stock dividend to the Trustee and not yet redeemed by the Company, are income or corpus in the hands of the Trustee for the purpose of administering the said Trust."

The second question was, of course, phrased before the shares with which it is concerned were redeemed and, therefore, is not now entirely appropriate.

The authorities on matters of this kind are numerous and, if I may say so, frequently discordant. Reconciliation of what is contained in many of them is not easily attained but this much can be said: whether shares which come into the hands of trustees in circumstances such as I have outlined above are received as capital or income depends upon the intention of the company effecting delivery of those shares. What that intention was is a question of fact in each instance and when it has been ascertained it is binding upon all persons interested in the trusts.

If I correctly apprehend what was decided in *Bouch et al. v. Sproule* (1887), 12 App. Cas. 385, and in the cases which follow it, including *Re Fleck, supra*, it is that whatever may be the means used by a company to transmit accumulated profits to its shareholders, the answer to the question whether those profits reach the shareholders as income or capital is to be found not only in the form of the transaction, but by determining its substance. That principle has been described in many ways, but I believe that it is essentially a question of fact in each case as to what has been the company's decision with respect to the ultimate disposition of the surplus. If a company decides to devote the accrued income to capital purposes, any shares issued by reason of that decision, or the proceeds thereof, will be regarded as a capital accretion to the shareholders no matter what process is employed by the company to achieve its objective. If, on the contrary, the company resolves to pass the surplus income over to its shareholders rather than to blend it into its capital fabric, the shareholders will be deemed to receive income and not capital.

As in the *Fleck* case, the sole and fundamental intention of this company was to distribute the tax-paid accumulated income among its shareholders in such a way as to relieve them from the burden of personal income tax. No other logical or reasonable construction can be placed upon the letter of 1st December 1950, or upon the steps taken thereafter by the company. The rather

intricate procedure invoked by it furnishes further incontrovertible proof of that intention because it was the only way by which the undistributed income could reach the shareholders as income without rendering them liable for tax. One must also bear in mind that the auditors' statements of the company for 1949 and for 1950 make it abundantly clear that at the end of 1949 the company's financial position was relatively liquid and that there was no possible reason for it to convert the accumulated income into capital. I repeat, therefore, that all that was done was part of a plan—a perfectly proper and legal one—to benefit the shareholders by paying over the accumulated surpluses really as dividends but involving a form of capitalization so as to free them from the obligation of paying personal income tax; what was done does not in any sense suggest an intention on the part of the company to add the value of the new redeemable preference shares to its capital structure. Accordingly, the essential nature of the transaction was to transfer income resting in the coffers of the company to its shareholders and the situation is, therefore, the converse of that which was presented to the Courts in the *Bouch* case, *supra*.

It was argued on behalf of the remaindermen that the process of capitalization had the result of irrevocably transforming the surplus from income to capital which could not thereafter be regarded as income for any purpose. This argument seems to be supported by the judgments in *Re Piercy*, [1907] 1 Ch. 289 at 294; *Commissioners of Inland Revenue v. Fisher's Executors*, [1926] A.C. 395 at 403; *Commissioner of Income-Tax, Bengal v. Mercantile Bank of India, Limited et al.*, [1936] A.C. 478; *Whitmore v. The Commissioners of Inland Revenue* (1925), 10 Tax Cas. 645; *In re Duff's Settlements*; *National Provincial Bank Ltd. v. Gregson et al.*, [1951] Ch. 923, [1951] 2 All E.R. 534, and by portions of the judgments in *Commissioners of Inland Revenue v. Blott*; *The Same v. Greenwood*, [1921] 2 A.C. 171 and *Hill v. Permanent Trustee Company of New South Wales, Limited et al.*, [1930] A.C. 720, but a perusal of the appeal book and memoranda of argument filed with the Court of Appeal in the *Fleck* case indicates that the proposition was raised and apparently rejected in that Court. While the resolutions and proceedings were silent as to any such incident, the Booth Lumber Company surplus must have been capitalized momen-

tarily, and, if that is so, the *Fleck* judgments repudiate the contention that once the accumulated income has been changed to capital, even to effect a distribution of income, that conversion arbitrarily settles the quality of the interest passing to the shareholders.

Counsel then invited me to distinguish this case from the *Fleck* case because of the diversity of procedure and language used when the respective plans were in the course of being executed. It cannot be denied that the technique of getting the moneys into the hands of the shareholders was not by any means the same in each instance, but in view of my conclusion that the essential purpose of both companies was to allow the shareholders to enjoy the undivided surplus income as such, it matters not that procedural differences can be found. Moreover, I believe that it would be undesirable and perhaps dangerous to search for and attempt to establish variations of method in other cases where it is obvious that the paramount concern of the company involved is to pass accumulated income on to its shareholders by issuing redeemable preference shares for the single purpose of freeing those shareholders from a personal tax liability. If relatively unimportant differences were given recognition, uncertainty would result and in almost every similar situation the question whether moneys received by trustees were income or capital would have to be determined by the Court after an extensive investigation. What is conclusive is that both companies decided to transfer the tax-paid accumulated income as such to their respective shareholders and they adopted a similar, though not entirely identical, method of ensuring that the shareholders would not be required to pay tax on receipt of that income.

The fact that redemption was effected in the *Fleck* case immediately after the issue of the preference shares, and here some months later, does not alter the character of the two transactions. On this point reference should be made to *Aykroyd v. Commissioners of Inland Revenue*, [1942] 2 All E.R. 665. The Court is obliged to ascertain the decision of the company when it embarked upon the plan which ultimately causes the moneys to be paid to its shareholders in exchange for the shares, and if at that time it was the company's intention to release those moneys to



its shareholders at once or soon thereafter, then I am of the opinion that what the shareholders got was income.

No purpose whatever would be served by examining and discussing the other decided cases on this subject. If I am right in interpreting *Re Fleck* as I have, it must be followed.

Both questions will therefore be answered by a declaration that the sums received by the trustee upon the redemption of the company's preference shares represent income and not capital.

Costs of all parties are to be taxed on a solicitor-and-client basis and are to be paid out of the moneys in question forthwith after taxation.

*Judgment accordingly.*

*Solicitor for the trustee, applicant: Robert S. Johnston, Hamilton.*

*Solicitors for the Victorian Order of Nurses branches: Mason, Foulds, Arnup, Walter & Weir, Toronto.*

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[AYLESWORTH J.A.]

**Ex parte Johnston.**

*Criminal Law — Summary Trials of Indictable Offences — Jurisdiction and Powers of Magistrate — Plea of Guilty after Election — Effect — Magistrate without Power to Commit for Trial — The Criminal Code, R.S.C. 1927, c. 36, ss. 774(1) (re-enacted by 1938, c. 44, s. 39), 781, 784.*

When a magistrate proposes to dispose summarily of a charge of an indictable offence, and the accused person elects for summary trial and at the proper time pleads guilty to the charge, he there and then stands convicted of that charge and the magistrate thereafter has no power to commit him or purport to commit him for trial thereon, or to do anything except impose sentence according to s. 781 of The Criminal Code. *Regina v. Miles* (1890), 24 Q.B.D. 423; *Regina v. Blaby*, [1894] 2 Q.B. 170; *Rex v. Sheridan* (1936), 26 Cr. App. R. 1; *Rex v. Grant* (1936), 26 Cr. App. R. 8, applied; *Arcadi v. The King* (1931), 51 Que. K.B. 533, considered.

AN APPLICATION for a writ of habeas corpus.

28th January 1953. The application was heard by AYLESWORTH J.A. in chambers at Toronto.

*C. L. Dubin, Q.C.*, for the applicant.

*N. L. Mathews, Q.C.*, contra.

17th February 1953. AYLESWORTH J.A.:—The prisoner moves for the issue of a writ of habeas corpus directed to the

keeper of the common gaol at the County of York and for a writ of certiorari in aid thereof upon the ground that "the Accused having appeared before His Worship Magistrate Browne on the 21st of April, 1950 and again on the 26th day of April, 1950, and having elected to be tried by the said Magistrate Browne, and having pleaded guilty can not now be tried by any other tribunal, and that the learned Magistrate had no jurisdiction to commit the Accused for trial under the circumstances then before him, and the Accused is therefore being illegally detained for trial by another tribunal".

At the request of counsel for both parties I agreed that the matter should be dealt with by me as on a motion for discharge of the prisoner on a return to the writ of habeas corpus.

On 14th April 1950 an information was laid against the prisoner charging that he "on the 27th day of February in the year 1950, at the City of Toronto, in the County of York, unlawfully did have in his possession a drug, to wit, Diacetylmorphine, without the authority of a license from the Minister of National Health and Welfare first had and obtained or other lawful authority, contrary to Section 4(1) (d) of the Opium and Narcotic Drug Act 1929 and amendments thereto; and further that the said [prisoner] is a habitual criminal".

The prisoner appeared before the late Magistrate Browne on 21st April 1950, and it is important to quote extensively from the transcript of the proceedings had upon that day and upon 26th April 1950:

"CLERK OF COURT: Have you a lawyer? THE ACCUSED: No, I have not.

"CLERK OF COURT: Are you ready to proceed with your trial? THE ACCUSED: Yes.

"CLERK OF COURT (Reads charge): 'On the 27th day of February, in the year 1950, at the City of Toronto, in the County of York, unlawfully did have in your possession a drug, to wit, diacetylmorphine . . . contrary to the Opium and Narcotic Drug Act and amendments thereto.' How does the Crown elect to proceed? MR. MATHEWS: By indictment.

"CLERK OF COURT: On this charge you have the option to be tried forthwith by the Magistrate without the intervention of a jury or to remain in custody or under bail as the Court may decide to be tried in the regular way by the next Court having

competent criminal jurisdiction. How do you wish to be tried on this charge, by the Magistrate or by the next Court? THE ACCUSED: Summarily by the Magistrate.

"MR. MATHEWS: I am asking that this be treated as a preliminary inquiry only and that it be—if you find there is a *prima facie* case, that he be committed for trial.

"THE MAGISTRATE: He can be tried by me and plead if he wishes.

"MR. MATHEWS: I am asking, and your Worship has power to provide he proceed with the preliminary.

"THE MAGISTRATE: Why should I do that?

"MR. MATHEWS: For the simple reason there is another charge that your Worship has not power to try and which must be tried by a Court upstairs. He was not arraigned on that.

"THE ACCUSED: On this particular charge, can't we dispose of this? I have been given a chance to elect and plead guilty.

"THE MAGISTRATE: I wish to hear the other charge first.

"CLERK OF COURT (Reads charge of 'Habitual Criminal').

"MR. MATHEWS: That is the reason I am asking they all be sent upstairs.

"THE MAGISTRATE: All right, let me hear the evidence."

I have quoted in full the first part of the record of the proceedings immediately after the statement of the appearances. Immediately after that part of the record so quoted appears the sworn testimony of two witnesses for the Crown deposing as to the particulars and details of the offence. The record then continues:

"MR. MATHEWS: I think that is sufficient for a committal.

"THE MAGISTRATE: I may be going to dispose of this; he elected to be tried in this Court and pleaded guilty.

"MR. MATHEWS: No, he cannot be. If you did that the habitual criminal charge could not be tried.

"THE MAGISTRATE: I will have to consider that.

"MR. MATHEWS: If you would like to remand it, there is no doubt about that point.

"Argument.

"THE MAGISTRATE: You will be remanded to the 26th of April on this charge.

"MR. MATHEWS: For disposition.



"THE MAGISTRATE: For disposition on this charge and I have not heard the evidence on the other charge.

"Accused remanded to April 26th.

"Toronto, Ontario,

"Wednesday, April 26th, 1950.

"On resuming.

"THE MAGISTRATE: This case was remanded until today. I have been requested by the Special Prosecutor to treat this case as a preliminary hearing, and from the nature of all the counts in the Information I believe this matter should be disposed of by a higher Court at the same time and I should therefore treat it as a preliminary hearing.

"CLERK OF COURT: Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything, but anything you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise or favour and nothing to fear from any threat which may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you at your trial notwithstanding such promise or threat. Have you anything to say in answer to this charge at this time? THE ACCUSED: No sir.

"CLERK OF COURT: Any witnesses to call? THE ACCUSED: No.

"THE MAGISTRATE: Committed for trial."

Upon the face of the information the following endorsements are recorded:

"Apr. 14 1950 Rem. to April 19th.

"Apr. 19 1950 Rem. to April 21st.

"Apr. 21 1950 Crown elects to proceed as an indictable offence on charge.

"Defendant elects to be tried summarily and pleads guilty.

"Rem. to April 26th for Disp.

"Apr. 26 1950 Committed for Trial."

Immediately after these endorsements appears the signature of the late Magistrate Browne.

It is made to appear by affidavit that on 3rd May 1950 the prisoner was brought before His Honour Judge Macdonell "to give him the opportunity of electing speedy trial", and that the

prisoner then elected trial by a jury; that on 5th May 1950 an indictment was presented to the grand jury of the General Sessions of the Peace for the County of York on the authority of His Honour Judge Forsyth, charging the prisoner identically as he was charged in the information, and that a true bill was returned on the indictment; that on 16th October 1950 the prisoner appeared for trial in the General Sessions of the Peace but was not prepared to proceed with his trial and was permitted to re-elect speedy trial before a judge without a jury; that on 8th May 1951 the prisoner again appeared for trial in the County Court Judges' Criminal Court of the County of York but was not ready to proceed with his trial owing to absence of his counsel, and that the trial was then adjourned to a date to be arranged; and finally that the charges once again now await trial pending disposition of the instant proceeding.

When the prisoner appeared before the late Magistrate Browne on 21st April 1950, clause *a* of s. 774(1) of The Criminal Code, R.S.C. 1927, c. 36, as re-enacted by 1938, c. 44, s. 39, applied to the charge before him, the Crown having elected to proceed before the magistrate by way of indictment. Section 781 of the Code prescribes certain procedure to be followed by the magistrate "Whenever the magistrate . . . proposes to dispose of the case summarily"; unless the magistrate so proposes, the section has no application to the case before him and the proceedings will be by way of preliminary inquiry leading, in proper circumstances, to committal of the accused for trial. I think it quite evident from the record of the proceedings that the late magistrate did propose to dispose of the case against the prisoner summarily; it is only when a magistrate so proposes that it is necessary or even sensible to inform the prisoner that he has an option as to his mode of trial. In the instant case the procedure adopted by the magistrate was precisely that prescribed by subs. 2 of s. 781, and this procedure resulted in the prisoner's election for summary trial as contemplated by subs. 3 of s. 781.

Subsection 4 of s. 781 reads in part as follows: "If the person charged confesses the charge the magistrate shall then proceed to pass such sentence upon him as by law may be passed in respect to such offence, subject to the provisions of this Act. . . ."

I also think it perfectly clear, not only from the transcript of the evidence taken before the late magistrate, but also from the

endorsements on the information appearing over his signature, that the prisoner pleaded guilty at a time and in a manner which was in conformity with the provisions of s. 781 and that the magistrate also must be taken to have been acting strictly in conformity with that section; indeed it was his plain duty so to act, and since his jurisdiction to dispose of the charge summarily was a special statutory jurisdiction only, the applicable statutory provisions must be strictly construed.

The magistrate, however, on the resumption of proceedings before him on the 26th April 1950, committed or purported to commit the prisoner for trial. His power to do this must be found in s. 784 of the Code which reads in part: "If, in any proceeding under this Part, it appears to the magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any other circumstance ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, such magistrate may, before the accused person has made his defence, decide not to adjudicate summarily upon the case. . . ."

In the instant case the prisoner had not "made his defence"; he had gone much further than that—he had confessed the charge against him and his plea of guilty is formally recorded by the magistrate upon the information. I say that the prisoner had gone much further than making his defence because I hold that when a magistrate proposes to dispose of a case summarily under the provisions of Part XVI of the Code, and an accused person, appearing before the magistrate on such charge, elects for summary trial and at the proper time pleads guilty to the charge, he there and then stands convicted of such charge and the magistrate thereafter has no power to commit him or purport to commit him for trial thereon: *Regina v. Miles* (1890), 24 Q.B.D. 423; *Regina v. Blaby*, [1894] 2 Q.B. 170; *Rex v. Sheridan* (1936), 26 Cr. App. R. 1; *Rex v. Grant* (1936), 26 Cr. App. R. 8.

Counsel for the Crown refers to s. 775 of the Code, which in effect provides that where an offence is punishable, as this one is, with imprisonment for a period exceeding five years the Attorney General may require that the charge be tried by a jury notwithstanding that the person charged has consented to be tried by a magistrate, to s. 825, wherein appears a similar provision respecting an accused person who has consented to speedy trial



by a judge under Part XVIII of the Code, and to *Arcadi v. The King*, 51 Que. K.B. 533, 57 C.C.C. 117, [1932] 2 D.L.R. 429. Section 775, however, has not been invoked by the Attorney General and I need not consider the effect of its provisions. Section 825, of course, has no application to this case since it is not one of election for speedy trial under Part XVIII and that fact is sufficient to distinguish this case completely from the facts in the *Arcadi* case, *supra*. That decision was made by the Quebec Court of King's Bench, Appeal Side, with five judges hearing the appeal. The accused, having elected speedy trial, pleaded guilty and was remanded to a stated day for sentence, but before that day the Attorney General intervened under s. 825 and required the charge to be tried by a jury. In such circumstances it was held by four members of the Court that the prisoner's plea of *autrefois convict* was not sustainable, the other member of the Court dissenting on the ground that the Attorney General's intervention came too late.

Two of the learned judges, in holding that the plea of *autrefois convict* was not sustainable, rested their decision strictly upon the special or overriding power of intervention given to the Attorney General by s. 825; this is made to appear plainly in two separate passages which I quote from the judgment of Bond J., in which Hall J. concurred:

"It is contended on behalf of the appellant that his plea of 'guilty' was equivalent to a conviction, and all the more so that, following thereon, the Judge of the Sessions fixed a subsequent day for the imposition of the sentence.

"Whether a plea of 'guilty' be equivalent of a conviction or not, the fact remains that the intervention of the Attorney-General is authorized at any time prior to the pronouncement of the sentence . . .

"Whatever might be in the effect of a plea of *autrefois convict*, after a conviction but before a sentence, in other cases the special provisions of para. 5 of s. 825 of the Criminal Code must be given effect to."

St-Germain J., whose judgment was concurred in by Bernier J., went much further and held that a plea of guilty not followed by sentence was not a "conviction" within the meaning of the sections of The Criminal Code relating to the plea of *autrefois convict* (ss. 905 *et seq.*). In this respect the judgment of St-

Germain J. is in direct conflict with the English decisions to which reference has been made, but as only one other of his brother judges agreed with him upon the point so in conflict, his judgment in this respect is really a minority judgment; as I have already said, Dorion J. dissented from the other members of the Court on the ground that the Attorney General's intervention came too late, while Bond and Hall JJ. expressly left the point open. For these reasons I am all the more receptive to argument leading to a different conclusion.

Finally, and with great respect, I prefer and accept the reasoning as to the effect of a plea of guilty when properly made so admirably expressed by the English judges in the cases referred to.

But having found, as I do, that the prisoner is presently detained under an illegal warrant committing him for trial, I must still consider whether or not he ought to be discharged from custody, and I now turn to that important question.

The prisoner, of course, was committed into custody to await his trial under warrant of the late Magistrate Browne on 26th April 1950 and has been in custody ever since that time. On 3rd May 1950, however, he was convicted on an entirely separate charge and completed the service of his sentence under that other charge in March 1952. The period, therefore, of his detention under the illegal warrant of committal into custody for trial is something less than one year. The maximum sentence for the offence of which he has been convicted is seven years in the penitentiary plus a fine not exceeding \$1,000, and in addition a whipping may be imposed. After due consideration I have concluded that I ought not to discharge the prisoner; I think I will best further the ends of justice if I make an order for his further detention under s. 1120 of the Code.

An order will therefore go quashing the warrant of commitment for trial and directing that the prisoner be remanded in the custody of the gaoler and be brought before the Senior Magistrate for the City of Toronto on Tuesday the 24th February 1953, at the hour of ten o'clock in the morning or so soon thereafter as may be convenient to the learned magistrate for sentence by the learned magistrate upon the prisoner's conviction of 21st April 1950. The learned magistrate in sentencing the prisoner doubtless will give whatever consideration ought to be given to the

fact that the prisoner has been detained in custody illegally for approximately one year: *Rex v. Patterson*, [1947] O.W.N. 146, 87 C.C.C. 86, 2 C.R. 528; *Rex v. Deschamps*, [1951] O.W.N. 586, 100 C.C.C. 191, 12 C.R. 378.

*Order accordingly.*

*Solicitors for the applicant: Kimber & Dubin, Toronto.*

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[COURT OF APPEAL.]

**Regina v. Boyd.**

*Criminal Law — Appeals from Conviction — Setting Aside Verdict as Unreasonable — Rejection of Alibi Evidence — The Criminal Code, R.S.C. 1927, c. 36, s. 1014(1) (a).*

Although it is not the function of the Court of Appeal, in a criminal appeal, to retry the case, or to decide the guilt or innocence of the appellant, it is its duty to decide whether the jury's verdict is reasonable and can be supported having regard to the evidence. The Court should set aside the verdict if, on the evidence carefully and anxiously considered, it is of the opinion that the offence has not been proved with the degree of certainty necessary to justify a verdict of guilty. *Rex v. Barnes* (1942), 28 Cr. App. R. 141; *Rex v. Lovering*, [1948] O.R. 565, applied. It is not enough, in considering whether to act under s. 1014(1) (a) of The Criminal Code, to consider only whether there is any evidence to support the conviction. The Court should exercise its jurisdiction if, although there is some evidence, that evidence, in the opinion of the Court of Appeal, is of such a kind that the Court, as the statutory judge of fact as well as law, cannot resist the conclusion that it is unsafe to rest a conviction on it. *Rex v. McDonald* (1951), 4 W.W.R. (N.S.) 14, agreed with.

One of several accused persons, charged with bank robbery, was identified by only one witness as having taken part in the robbery, and adduced evidence of an alibi which, in the opinion of the Court of Appeal, was much stronger than the evidence of identification. In addition there was other evidence that, if accepted, made it unlikely that the accused had participated in the robbery.

On appeal, *held*, the conviction should be set aside as unreasonable, and an acquittal should be directed. *Rex v. Chadwick, Matthews and Johnson* (1917), 12 Cr. App. R. 247, referred to.

*Criminal Law — Appeals — Report of Trial Judge — Right of Trial Judge to Make Report and of Court of Appeal to Consider It — The Criminal Code, R.S.C. 1927, c. 36, s. 1020(1).*

A trial judge is entitled, after a conviction by a jury, to report to the Court of Appeal under s. 1020(1) of The Criminal Code that had he been trying the case without a jury he would have accepted the evidence of alibi and acquitted the accused. Such a report is properly before the Court of Appeal and, although it is not sufficient justification in itself for allowing the appeal, it should be considered and weight should be given to it in arriving at a decision, since the trial judge has seen the witnesses and observed their demeanour. *Rex v. Rice* (1927), 20 Cr. App. R. 21 at 23, referred to.

AN APPLICATION for leave to appeal and AN APPEAL from conviction, before Forsyth Co. Ct. J. and a jury, in the Court of General Sessions of the Peace for the County of York.



9th February 1953. The application and appeal were heard by PICKUP C.J.O. and J. K. MACKAY and F. G. MACKAY JJ.A.

*G. A. Martin, Q.C. (F. J. McMahon, with him)*, for the accused, appellant: 1. This conviction should be set aside as unreasonable and not supported by the evidence. The only evidence connecting this accused with the robbery is the identification by Betty Cooley, an employee of the bank. Mrs. Cooley first identified the appellant at a police line-up four months after the event. A Miss Wells, who was working near Mrs. Cooley and must have seen the same man equally clearly, and who also attended this line-up, was not called as a witness at the trial, and we were not allowed to find out whom, if anyone, she identified there. There was nothing in the description given by Mrs. Cooley that would not have fitted many other men, and she admitted that at least parts of her description would fit the appellant's brother, Edwin Boyd, who was also charged. As against this evidence of identity there was the very strong alibi evidence of Anderson, an employee of the City of Toronto for 39 years, whose evidence was not in any way shaken in cross-examination. There was also other evidence, apart from the alibi, that indicated that the accused was not one of those who took part in the robbery.

This was a very sensational case, involved with the murder of a policeman and an escape from custody, and all these circumstances, which must have been in the minds of the jury, precluded the possibility of an impartial and judicial consideration of the evidence by them.

In a long series of cases appellate Courts have not hesitated to quash convictions where they thought the jury had given insufficient weight to evidence of an alibi: *Rex v. Paris* (1922), 49 N.B.R. 400, 38 C.C.C. 126, 69 D.L.R. 373; *Demers v. The King*, 41 Que. K.B. 347, 46 C.C.C. 394 at 395, [1926] 4 D.L.R. 991; *Rex v. Murphy* (1921), 15 Cr. App. R. 181 at 182; *Rex v. Chadwick, Matthews and Johnson* (1917), 12 Cr. App. R. 247; *Rex v. Rice* (1927), 20 Cr. App. R. 21; *Rex v. Tonelli* (1951), 3 W.W.R. (N.S.) 495, 99 C.C.C. 345, 13 C.R. 430.

In cases where the question is as to identity it is particularly important that the evidence be scrutinized with the greatest care because, as pointed out by Wigmore and others, tragic errors have occurred: *Wills on Circumstantial Evidence*, 7th ed. 1937, p. 193; *Rex v. McDonald* (1951), 4 W.W.R. (N.S.) 14, 101 C.C.C.

78, 13 C.R. 349; *Regina v. Smith*, [1952] O.R. 432 at 442, 103 C.C.C. 58, 14 C.R. 304, quoting from *Craig v. The King* (1933), 49 C.L.R. 429; *Davies v. The King*; *Cody v. The King* (1937), 57 C.L.R. 170.

2. Alternatively, we are entitled at least to a new trial, on several grounds. The first of these is that the learned trial judge erred in refusing, on the Crown's objection, to permit us to ask the police officers who was identified at the line-up by Miss Wells.

3. The cross-examination of the appellant by Crown counsel at the trial was objectionable in two respects: (a) he was cross-examined as to the considerable quantity of money found in his possession when he was arrested, months after the offence, which had no probative value whatever; (b) he was cross-examined as to his renting of the apartment subsequently occupied by his co-accused Edwin Boyd, who was then a fugitive from justice—this not only had no probative value in connection with this charge, but tended to implicate the accused in another crime, *viz.*, Edwin Boyd's escape.

4. The trial judge charged the jury as to aiding and abetting in the commission of an offence, which was not only wholly unnecessary on the facts of this case, but might tend to confuse the jury and give them a wrong impression of the evidence necessary to justify a conviction of this accused, particularly in view of the Crown's cross-examination and of the stress it placed on the association between the two Boyds.

*W. B. Common, Q.C.*, for the Attorney-General, respondent:

1. The question here resolves itself wholly into one of credibility as between Mrs. Cooley and Anderson. It was open to the jury to reject Anderson's evidence, having regard to its frailty in several respects. Mrs. Cooley's evidence was perfectly definite and complete, and was worthy of acceptance. She did not limit herself to saying "that is the man", as in many of the cases, but described the physical characteristics of the robber she saw. She was quite unshaken in cross-examination. The alibi evidence, when analyzed, is not conclusive. Anderson bases his evidence rather on the regular course of conduct when Boyd was working with him on a job than on a definite recollection of the particular day.

The trial judge's report that he would have acquitted this accused if he had been trying the case without a jury is not justi-

fied under s. 1020(1) of The Criminal Code, R.S.C. 1927, c. 36. He has no right to express an opinion as to the guilt or innocence of the accused.

This is precisely the type of case in which an appellate Court should not interfere with the finding of the jury.

2. Any evidence given by a police officer as to what Miss Wells said at the line-up would have been hearsay and inadmissible. [PICKUP C.J.O.: But the fact that she saw the same line-up as Mrs. Cooley, and that Norman Boyd was in it, would not be hearsay, and if that evidence had been given the jury would have been entitled to infer, from the fact that Miss Wells was not called as a witness at the trial, that she could not identify Norman Boyd.] Miss Wells was available for the defence to call. In any event, even if the defence was entitled to have the question answered, no harm was done in the result.

3. The cross-examination was quite proper, and the fact that Norman Boyd had been acquitted on a charge of receiving, arising out of his possession of this money, was not a bar to it.

4. This part of the charge was all in the present tense and had nothing to do with any conduct subsequent to the robbery. It could not have confused the jury, or influenced them improperly.

*G. A. Martin, Q.C.*, in reply: The trial judge has not only a right but a duty to make a report under s. 1020(1), and in it to state "his opinion upon the case".

*Cur. adv. vult.*

18th February 1953. The judgment of the Court was delivered by

PICKUP C.J.O.:—This is an appeal by Norman Boyd from his conviction on a charge of armed robbery. He was tried by a jury before the Senior County Judge presiding in the Court of General Sessions of the Peace for the County of York, and convicted by the jury, on 26th September 1952. He was sentenced to three years' imprisonment.

The main ground of appeal is that the verdict of the jury is unreasonable and cannot be supported, having regard to the evidence. The sole question in issue is the question of the identity of the appellant as being one of the persons taking part in the armed robbery. The appellant was charged with this offence



along with Edwin Alonzo Boyd, William Russell Jackson, Leonard Jackson and Valen Lesso. At the time of the robbery the appellant was gainfully employed and had no criminal record. The only evidence against him was the evidence of one Mrs. Cooley, an employee of The Royal Bank of Canada where the robbery occurred.

The robbery occurred on 30th November 1951 shortly after 11 o'clock in the forenoon. The appellant was a stranger to Mrs. Cooley. He was arrested on 15th March 1952 with his brother, Edwin Alonzo Boyd. On 3rd April 1952 Mrs. Cooley attended a police line-up in which both Edwin Alonzo Boyd and the appellant were. She had, before this time, seen a photograph or photographs of Edwin Alonzo Boyd, but none of the appellant. She was asked by the police to look at the line-up and see if she could identify anyone who participated in the robbery. She looked over the line-up from left to right and when she came to no. 4 from the left she identified that person. He was the appellant. She did not identify anyone else. Edwin Alonzo Boyd was no. 10 from the left in the line-up.

In giving her evidence at the trial Mrs. Cooley said that what she noticed mainly at the time of the robbery was that the appellant had on a kind of a blue trench-style raincoat and a light grey fedora. Upon being asked if she could describe his features, she said that he needed a shave, his eyes were very deep-sunk and he had a marking on his chin. She stated that she had no doubt about the identity of the appellant. In cross-examination she added to her description that the man had a long face. She also stated that Edwin Alonzo Boyd had a long face.

With Mrs. Cooley at the scene of the robbery was another employee of the bank, Miss Wells. Miss Wells had as good an opportunity to observe the man, whom Mrs. Cooley identified as the appellant, as had Mrs. Cooley. Miss Wells also attended the line-up on 3rd April 1952 in which both of the Boyds were, but she was not called as a witness at the trial. Mrs. Cooley said that Miss Wells was excited and was fixing her shoe. I would expect that both of them would be excited when confronted with a robber who had a gun in his hand. Miss Wells was as near to the man identified as was Mrs. Cooley at the time when they were both ordered by him to get back against the wall. It is a fair inference, from the fact that Miss Wells was not called as a

witness, that she could not identify the appellant as participating in the robbery.

The appellant gave evidence at his trial and denied any participation in the robbery, saying that at the time the robbery took place he was at work, being an employee of the Corporation of the City of Toronto. He said that he was on a survey job at that time.

His evidence was supported by the evidence of one McCarthy, an engineer in the works department of the City of Toronto. This witness produced certain time-records which showed the appellant to have been at work on the 30th November 1951, the day of the robbery, from 8.30 o'clock in the morning until 12 o'clock noon, recommencing at 1 o'clock in the afternoon and continuing until 4.30 o'clock. If this record was true, the appellant did not participate in the robbery, because the robbery took place shortly after 11 o'clock in the forenoon. This time-record appears from the evidence to have been made by the appellant, but it was approved or certified by the witness McCarthy. The witness McCarthy would have no knowledge of the actual movements of the appellant on the day of the robbery and spoke only from the records, but the records also showed that the witness McCarthy had assigned the appellant, along with one Anderson, to a survey job of certain lanes in Toronto. This assignment was made on the 29th November, and this witness said that job would probably carry over into the 30th November.

Mr. Anderson was also called as a witness for the defence, and he testified to the appellant's having been engaged with him on the survey referred to on the 29th and 30th November; that they were working on the survey on the morning of 30th November, returning directly to the office to complete the office-work in connection with the survey. He says that this took them until after lunch. He was the appellant's boss on the work, and said that the appellant did come back with him to the office after completing the field-work on the morning of 30th November. There were only the two of them engaged on this field-work, and the work was such that one alone could not perform it. This witness also said that the appellant and he got back to the city hall between 11.30 and 12 o'clock, and that the appellant had his lunch there. The witness testified that he remembered the occasion, and referred to some facts which refreshed his memory,

particularly that on the evening of the 29th November, the survey work not being completed, they left their equipment at a particular service-station. This witness is an instrument-man and has been employed in the works department of the City of Toronto for approximately 39 years. Counsel for the Crown does not question the honesty of this witness but contends that, although honest in giving his evidence, he may be mistaken.

Apart from the alibi evidence on behalf of the appellant, there is a question raised by the evidence as to the number of men engaged in the robbery. One witness, Mr. Knox, called by the Crown, saw the robbers leaving the bank premises after the hold-up, and the number he saw was four. He saw them get into the car and drive away. The driver of the car was Edwin Alonzo Boyd, and he was identified as one of the robbers who were in the bank. Counsel for the Crown suggests that this witness may not have seen a fifth man get into the car. The witness, however, had a good view of the departing robbers. If there were only four men engaged in the robbery, and not five, the appellant was not among them because no one suggests that the other four persons, namely, Edwin Alonzo Boyd, William Russell Jackson, Leonard Jackson and Valen Lesso, did not actively participate in the robbery. Mrs. Cooley, in her evidence, said that she saw three men participating in the robbery.

It was brought out in evidence that the appellant was arrested with the accused, Edwin Alonzo Boyd, after the latter had escaped from prison; that at that time they were residing together, and that each of them was in possession of a substantial sum of currency, although the amount in the possession of Edwin Alonzo Boyd was much greater than the amount found in the possession of the appellant. The appellant was, however, acquitted of the offence of having in his possession any stolen money. He was found guilty on the charge of receiving, comforting or assisting Edwin Alonzo Boyd, in order to enable the latter to escape, knowing that he had escaped from prison where he was being lawfully confined.

In charging the jury the learned trial judge charged them as to aiding and abetting. He said to the jury:

"Now gentlemen, I do not know whether you think some of these men committed this robbery and others helped them at it or not, so it is my duty to tell you what the law is in regard to aiding



and abetting. Any person who aids, abets, assists or counsels any person to commit an offence, is not guilty of aiding and abetting, he is guilty of the offence itself, that is, if I assist you to commit a certain crime, although I may not take any active part in it I am still guilty of that offence. If I aid, abet or counsel or procure you to commit that offence, then I am guilty of the offence. I trust you will bear that in mind as you consider the evidence in this case."

This was objected to by counsel for the appellant, but the learned trial judge did not clarify it to the jury. The jury may have thought that the appellant could be guilty of the offence charged without taking part in the robbery itself. The issue in this case was not whether the appellant aided, abetted, assisted or counselled the commission of the offence. If he was in fact the person whom the witness, Mrs. Cooley, saw, he was an active participant in the very act of the robbery itself.

I have fully in mind, in considering this case, that it is not the function of this Court to retry the appellant or to decide his guilt or innocence. That is the function of the jury. But it is the duty of this Court to decide whether the verdict of the jury is reasonable, and whether it can be supported, having regard to the evidence. This Court, in the case of *Rex v. Lovering*, [1948] O.R. 565, 92 C.C.C. 65, 6 C.R. 67, adopted and followed the principle stated by Humphreys J. in *Rex v. Barnes* (1942), 28 Cr. App. R. 141, which is that it is the duty of the Court of Appeal to set aside the verdict of the jury if, on the evidence carefully and anxiously considered, the appellate Court is of the opinion that the offence was not proved with that certainty which is necessary in order to justify a verdict of guilty.

In the report received by this Court from the learned trial judge pursuant to s. 1020(1) of The Criminal Code, R.S.C. 1927, c. 36, the learned trial judge stated that if he had been trying the case without a jury he would have accepted the evidence with respect to the alibi, and would have found the appellant not guilty. This would not be sufficient justification for this Court allowing the appeal, but it is an opinion which we have the right to consider, and should give some weight to. The learned trial judge saw the witnesses and could observe their demeanour.

It was suggested on the argument of the appeal that this report should not have been submitted to this Court. I think,

however, that the report is properly before us in accordance with the statute and the Rules of Practice, and should be considered by the Court in coming to our conclusion: *Rex v. Rice* (1927), 20 Cr. App. R. 21 at 23.

Counsel for the appellant has referred the Court to *Rex v. Chadwick, Matthews and Johnson* (1917), 12 Cr. App. R. 247, and other cases where it is stated that a jury is not entitled to disregard strong evidence of an alibi, except on stronger evidence. The evidence of alibi in this case was very strong and, in my opinion, much stronger than the evidence identifying the appellant. I am not weighing the probability of guilt on the evidence, nor am I substituting my doubt of guilt for that of the jury. I am unable to see how a jury in this case could reasonably convict the appellant on the evidence.

It is not enough, in considering s. 1014(1) (a) of The Criminal Code, for this Court to consider only whether there is any evidence to support a conviction. As stated by O'Halloran J.A. in *Rex v. McDonald* (1951), 4 W.W.R. (N.S.) 14, 101 C.C.C. 78, 13 C.R. 349, the Court of Appeal should exercise its jurisdiction in cases where there is some evidence to support a conviction, if such evidence, in the opinion of the Court of Appeal, is of such a kind, description or character that the Court of Appeal, as the statutory judge of fact as well as law, cannot resist the conclusion that it is unsafe to rest a conviction thereon.

After carefully considering the evidence in this case, I cannot resist the conclusion that on the facts of the case it would be unsafe to rest a conviction on the evidence given, and I am of the opinion that the offence charged against the appellant has not been proved with that certainty which is necessary in order to justify a verdict of guilty.

Other objections were raised by counsel for the appellant. At the trial counsel for the appellant was not permitted by the learned trial judge to bring out in evidence from one of the police officers who was picked out by Miss Wells from the line-up which both she and Mrs. Cooley saw. Counsel for the Crown suggested that the defence could have called Miss Wells as a witness. I think, however, the defence was clearly entitled to find out from the police officer present whether or not Miss Wells was able to identify the appellant. It had been shown in evidence that she had as good an opportunity to observe the robber at the time of

the robbery as had Mrs. Cooley. Considerable emphasis was also laid upon certain facts surrounding the arrest of the accused when found with his brother, who was an escaped prisoner, and particularly upon the fact that currency was found on the appellant at the time of his arrest. There was no evidence that this money had been stolen, but the finding of this money in the possession of the appellant was associated with the finding of a much larger sum of money in possession of his brother. The appellant was cross-examined at considerable length as to where he had got the money found in his possession. The appellant was tried along with his brother, and the Court was informed that, when giving his evidence in the witness-box, he was manacled to a police officer, which might well have associated him in the minds of the jury as being one of the persons who had escaped from the Toronto gaol. These are matters which are directed more to the granting of a new trial, but, when considered by the jury along with the charge of the learned trial judge as to aiding and abetting, they may have confused the jury so that they failed to appreciate the main question in the case, which was whether or not they should accept the defence evidence as to alibi. The case, in my opinion, is not one in which a new trial would be justified.

I would grant leave to appeal under s. 1013 of The Criminal Code, allow the appeal, set aside the conviction and direct a verdict of acquittal.

*Acquittal directed.*

*Solicitors for the accused, appellant: McDermott & McMahon, Toronto.*

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[FERGUSON J.]

**Matthews and Matthews v. McVeigh.**

*Specific Performance — Agreement for Sale of Land — Conditions of Success by Purchaser in Action — Refusal of Money by Vendor — Promptness in Asserting Rights.*

*Sale of Land — Agreement for Payment of Purchase-price in Instalments — Default by Purchaser — Repudiation by Vendor — Rights of Parties.*

Specific performance of an agreement for the sale of land will not be granted unless it can be done without injustice to the vendor, which is not the case if the property has increased greatly in value during a time that the purchaser has been in substantial default. Further, it must appear in such an action that the purchaser was not only able and willing to carry out the contract, but actually offered to do so within what was, in the circumstances, a reasonable time. And finally, if the vendor has repudiated the agreement because of the purchaser's default, the latter must show that he applied to the Court for relief promptly after learning of the repudiation. *Tilley v. Thomas* (1867), L.R. 3 Ch. 61; *Frederickson (Frederiksen) v. Stanton and Richards* (1913), 6 Sask. L.R. 105; *Gowans v. Pillsbury* (1919), 18 O.W.N. 24, applied.

AN ACTION for specific performance.

14th and 15th January 1953. The action was tried by FERGUSON J. without a jury at Owen Sound.

*G. F. Gardner*, for the plaintiffs.

*Campbell Grant, Q.C.*, and *C. A. Marron*, for the defendant.

24th February 1953. FERGUSON J.:—This is an action for specific performance of an agreement dated the 18th February 1952, for the sale of premises in Owen Sound, described in the statement of claim, for the sum of \$1,800. The premises are said to be now worth \$8,000.

The agreement provided that the purchase-price should be paid by the plaintiffs in instalments at the rate of \$40 per month, which payments should be accumulated for a period of six months and from the accumulated sum there should first be deducted interest on the unpaid balance of the purchase-price and taxes and the balance should be credited in reduction of the principal. The last payment under the agreement was due on the 18th February 1947. The plaintiffs took possession in pursuance of the agreement and have continued in possession ever since.

The plaintiffs covenanted that they would give up possession on breach made in all or any of the covenants, including the covenant to pay the purchase-price in the manner mentioned,

and that on such breach the agreement for sale should, at the option of the defendant, be void. The agreement contained the usual covenant on the part of the vendor on the performance of the covenants "to convey and assure or cause to be conveyed or assured to the [purchaser] . . . the said parcel or tract of land". Time was declared to be of the essence of the agreement.

The male plaintiff makes no pretence that he made payments as agreed without default. It is admitted that at some time in 1943 regular payments were discontinued, in fact he has not paid anything to the defendant since the end of 1943 or at least the beginning of 1944. The plaintiff has, however, paid the taxes and paid the interest on a mortgage for the sum of \$1,000 which the defendant put on the property at the time she purchased it. The plaintiff paid the interest on this mortgage until it was discharged in the year 1948.

The male plaintiff has been a close personal friend and an employee of the defendant's husband for the past 26 or 27 years. The payments that were made by the plaintiff to the defendant under the agreement were made by the defendant's husband issuing cheques in favour of the plaintiff, who endorsed them to the defendant. The amounts of these cheques were charged against the plaintiff's wages. The defendant's husband, although he never had any personal interest in the property, seems, at least at the beginning, to have acted as the defendant's agent, and at the end of 1943 he took it upon himself to agree with the plaintiff to postpone deductions from the pay-roll accounts, which the plaintiff, unjustifiably I think, assumed was sufficient authority for him to discontinue payments of principal to the defendant. He continued, however, as I have said, to pay the interest on the mortgage and the taxes on the property.

Matters remained in this state—unsatisfactory to the defendant as she was receiving nothing, but quite satisfactory to the plaintiff as he was paying nothing on capital account—and have substantially remained in that condition since.

The plaintiffs do not contend that they have paid anything to the defendant since the beginning of the year 1944, except a payment of \$25 to which I shall presently refer. Nevertheless, they seek to enforce their agreement, claiming that notwithstanding the long default the defendant has elected to keep the

agreement in force, and even if she has not expressly elected to keep the agreement in force, she has done so by implication as she has allowed the time for making payments to go by without declaring the agreement to be an end, and therefore she cannot terminate the agreement without fixing a new date after reasonable notice. They rely on *Danforth Heights Limited v. McDermid Brothers*, 52 O.L.R. 412, [1923] 4 D.L.R. 757.

The plaintiffs base their argument that the defendant has elected to keep the agreement in force on the grounds that: *firstly*, she has taken no steps to declare it void; *secondly*, she has taken the benefit of the payment of the taxes and the interest on the mortgage; and *thirdly*, she accepted a payment of \$25 in August 1948, which she acknowledged as a payment on account of the agreement.

As I have said, at the time the defendant purchased the property she placed a mortgage for \$1,000 on it. The male plaintiff always paid the interest on this mortgage. It became due in 1947 but the defendant was not able to pay it off at that time. She did pay it off in 1948. The plaintiff, not being apprised of that fact, went to the mortgagee with the half-year's interest, amounting to \$25, and, learning that the mortgage had been paid off, paid the amount to the defendant. She gave him a receipt dated 21st August 1948, noting on its face "Payment on agreement for sale. McVeigh & Matthews."

The male plaintiff and the defendant had no direct dealings until the year 1947, after the final payment under the agreement was due. Their business was transacted through the defendant's husband, who was and is the employer of the male plaintiff. The plaintiff says he ceased to make payments on the principal because of the arrangement he had made with the defendant's husband. He made no offer of payment to the defendant until the fall of 1947, by which time the final payment had become due. He went to the defendant's residence and stated to her that he had a cheque for \$600 which he was prepared to hand over to the defendant to obtain his deed. At that time the defendant told the plaintiff that she did not recognize the agreement because of the default and that, even if she did, a great deal more than \$600 was then due. The defendant and her husband, according to the plaintiff, then did some figuring and announced that the amount due was some-



thing more than \$800. The plaintiff offered to make up the balance or borrow enough money to pay the balance, but the defendant announced that she would not take the money.

Nothing was done until August 1948, when she received the payment of \$25 to which I have referred above. In that year the plaintiffs engaged Mr. McAvoy, a solicitor in Owen Sound, to obtain a statement from the defendant as to what was owing. She refused to give a statement and said that because of the long default she considered the agreement at an end. Nothing further was done until 1951, when some further conversations took place between the male plaintiff and the defendant. The plaintiff then served a statement of his estimate of what was owing, showing a balance of \$836.47. This figure was the result of the plaintiff giving himself credit for the sum of \$400 which he said had been deducted from his wages by the defendant's husband. The defendant made no reply to the statement tendered by the plaintiff, and finally, in November 1951, the plaintiff made legal tender on the defendant of \$1,000, which she refused to accept, and this action was commenced on the 29th August 1952.

It seems to me that the result of this case must depend upon the position of affairs in the fall of 1947 when the male plaintiff offered the defendant \$600. This, of course, was not legal tender, but that makes no difference because the defendant made it clear that she would not accept any amount. Therefore, it would have been idle for the plaintiff to make a tender which was sure to be refused. At the trial, the defendant stated that she was not prepared to accept any amount from the plaintiff. It is true that there had been default and default had continued over a period of three years.

The defendant's husband, who was called as a witness by the plaintiffs, stated that he did not tell his wife anything about the arrangements he had made with the plaintiff in the year 1943. Clearly, then, the defendant was not bound by the husband's arrangement, nor was she bound to treat as payments to her such sums as the husband deducted from the male plaintiff's wages. Therefore it seems to me that the plaintiffs could not, in 1947, have obtained from a Court an order for specific performance in view of their long default. I point out at this stage that this is an action for specific performance

only. There is no counterclaim for possession, the defendant being satisfied to treat the plaintiffs as tenants of the premises.

In an action for specific performance it must appear that the relief can be granted without injustice to the vendor. It seems to me that it would be an injustice to force the defendant to convey this property to the plaintiff, which increased in value from \$1,800 to \$8,000 during a period of time when the plaintiff was making substantial default. Further, in an action for specific performance it must also appear that the purchaser was not only able and willing but also offered to carry out the contract within what was, in the circumstances, a reasonable time, and further, that after he learned that the vendor repudiated the contract for default he was prompt in applying to the Court for relief: *Tilley v. Thomas* (1867), L.R. 3 Ch. 61, referred to in *Frederickson (Frederiksen) v. Stanton and Richards* (1913), 6 Sask. L.R. 105, 4 W.W.R. 1224, 12 D.L.R. 565.

I accept the defendant's evidence, which is corroborated by her husband, that at the time of the meeting in the fall of 1947 she made it clear that she did not recognize the agreement and that she refused to accept any sum. That being the position she took at that time, I do not think that she can be said, by the acceptance of the \$25 in August 1948, to have elected to keep the agreement in force.

In *Gowans v. Pillsbury* (1920), 18 O.W.N. 24, the plaintiff made default for a period of three years and then tendered the balance due. His tender was refused. He promptly brought an action for specific performance. Specific performance was refused because of the long delay, and in *Frederickson (Frederiksen) v. Stanton and Richards*, *supra*, there was similarly a three years' default. In that case, Lamont J. reviewed a number of the authorities, including *Kilmer v. British Columbia Orchard Lands, Limited*, [1913] A.C. 319, 10 D.L.R. 172, 3 W.W.R. 1119, and stated the law to be as I have intimated above, that:

" . . . to entitle the Court to interfere with the contractual rights of the parties and to grant the equitable relief of specific performance after default has been made by the purchaser in the performance of the contract, it must appear that such can be done without doing an injustice to the vendor. It must also appear that the purchaser not only has been able and willing, but also has offered to carry out the provisions of the contract

within what, under the circumstances was a reasonable time from the date specified for the performance of his obligation. Further, the purchaser, as soon as he learns that the vendor has cancelled or repudiated the contract for default, must be prompt in making his application to the Court for relief against the penalty provided for in the contract. If these conditions are not established, I am of opinion that the Court should not grant relief."

I am of the opinion that the male plaintiff has not in this case carried out any of the conditions mentioned. He never at any time tendered or offered to tender the amount which was obviously due. He knew as early as 1947 that the defendant contended that there was much more due on the contract than he was willing to offer and for a period of more than five years he did not bring action. I think his delay and laches constitute a bar to his claim for relief.

The defendant has counterclaimed, asking for a declaration that the agreement of the 18th February 1942 is terminated, and the relationship between the plaintiffs and the defendant is that of landlord and tenant, and for an accounting of the amount owing by the plaintiffs to the defendant on that basis. The agreement provides that "in the event of a breach of any of the Covenants herein contained by the said party of the second part [the plaintiffs], the said party of the first part [the defendant] shall be entitled to all the remedies of a landlord under the statutes in that behalf whether by distress or otherwise".

This clause gives the defendant the remedies of a landlord but it does not make the plaintiffs tenants. Whether or not the defendant is entitled to recover occupation rent from the plaintiffs is something that I do not have to decide.

The action for specific performance will be dismissed with costs. On the defendant's counterclaim there will be a declaration that the said agreement has been terminated, with costs.

*Judgment accordingly.*

*Solicitor for the plaintiffs: George F. Gardner, Owen Sound.*

*Solicitors for the defendant: Telford & Marron, Owen Sound.*

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[LEBEL J.]

**Bjorkman and Toronto Flying Club Limited v. The British Aviation Insurance Company Limited.**

*Insurance — Actions — Burden of Proof — Whether Damage within Risk Insured against — Specific Exclusion in Policy — Aviation Accident Insurance.*

The rules as to the burden of proof in insurance cases laid down in *Munro, Brice & Co. v. War Risks Association, Limited et al.*, [1918] 2 K.B. 78 (approved in Ontario in several cases, including *Luciani v. British America Assurance Co.* (1930), 65 O.L.R. 687 at 695) are not intended to supersede a proper construction of the policy. All the rules are concerned with qualifications, wholly or partly by exception from the specific policy risks, such as the usual exceptions of explosion, earthquake, etc., and they are based upon the underlying principle that it would be inequitable to require an insured to negative something about which he cannot be expected to have any knowledge. They do not relieve a plaintiff from the necessity for showing that his loss comes within the perils insured against, and if the proof of that fact, on a true construction of the policy, involves the proof of something more than the mere happening of the loss, the burden in that respect is on the plaintiff. *British and Foreign Marine Insurance Company, Limited v. Gaunt*, [1921] 2 A.C. 41 at 47; *Green v. Brown* (1744), 2 Stra. 1119, quoted.

A policy against accidental injury or death issued to a flying club covered a member of the club, *inter alia*, while flying as pilot in an aircraft owned or operated by the club, but specifically excluded night flying, with a further provision that this exclusion would not apply "provided all such flying is carried out in accordance with the regulations" of the club. A member of the club was killed while flying at night, and an action was brought by his widow-administratrix and the club. The defence was that the flight was not in accordance with the club's regulations, in that it was not supervised and approved by the chief flying instructor.

*Held*, in these circumstances, and on a proper construction of the policy, the onus was on the plaintiffs to prove that the flight was carried out in accordance with the regulations, and not on the defendant to disprove the fact. The defendant did not say it was not liable because the deceased was flying at night, but denied liability because the plaintiffs failed to prove that such flying was supervised, and hence authorized, by the chief flying instructor. Since the plaintiffs had failed to prove that the flight was so supervised and authorized, their action must fail.

AN ACTION for indemnity under a policy of insurance.

17th November 1952. The action was tried by LEBEL J. without a jury at Toronto.

*B. J. MacKinnon* and *O. J. D. Ross*, for the plaintiffs.

*J. S. Beatty, Q.C.*, for the defendant.

27th February 1953. LEBEL J.:—This is an action to recover \$10,000 under an "Aviation Personal Accident Insurance" policy issued by the defendant company to the plaintiff Toronto Flying Club Limited, to which I shall refer simply as "the Club". The plaintiff Margaret Bjorkman is the widow and adminis-

tratrix of the late Kermit Ernest Bjorkman, who was killed in a flying accident on or about 1st April 1950.

Kermit Ernest Bjorkman was a flying member of the Club and as such was an "insured" under the terms of an endorsement of the policy. He was also the holder of a "Limited Commercial Air Pilot's License", made valid by endorsement thereon for non-remunerative night flying.

The plaintiffs proved that at the time of the casualty the deceased was flying one of the Club's aircraft from Malton Airport, near Toronto, to Wichita, Kansas, via Buffalo and Detroit, and that bad weather having intervened after he left Buffalo about 9.15 p.m., he lost his bearings and crashed into Lake Huron near Port Huron, Michigan, and drowned.

The policy states that:

" . . . the Company hereby insures the Insured against loss resulting directly and independently of all other causes from bodily injuries sustained during the term of this Policy, solely through accidental means:

"(a) While the Insured is a passenger in an approved aircraft or is mounting into or dismounting from an approved aircraft . . .

"(c) While the Insured is awaiting rescue or is in course of taking reasonable steps to preserve his life, following a forced landing of an approved aircraft in which the Insured was riding, provided that the accident has happened at a place where the arrival of outside assistance at the place of the forced landing is essential to the preservation of life, and provided that such death or injury suffered is due to drowning or exposure as a direct result of the forced landing."

The following appears on a special endorsement of the policy:

"1. The cover provided by this Policy shall extend automatically to all members or employees of the Toronto Flying Club Limited and also to non-members but excluding flying instructors, whilst flying as Pilot, Co-Pilot, Student Pilot, Aircrew or Passenger in aircraft owned or operated by the Toronto Flying Club Limited."

A material exclusion from this policy risk is numbered 2(d). It reads:

"THIS POLICY shall not apply to death or bodily injury: . . .

“(2) (d) Unless otherwise provided by special Endorsement hereon, whilst the Insured is flying at night, unless he is flying in the course of his employment on a scheduled air transport service approved by the Company;”.

The words after the second “unless” above are not material in the instant case, but by para. 9 of the special endorsement of the policy permission to fly at night was reinstated conditionally.

Paragraph 9 reads:

“The coverage given by this Policy shall not be invalidated by reason of the provisions of Exclusions (2) . . . (d) . . . provided all such flying is carried out in accordance with the regulations of the Toronto Flying Club Limited”.

Paragraph 10 of this special endorsement reads:

“10. The benefits provided by this Policy shall not be payable in respect of any claim arising out of an accident occurring or resulting from an aircraft being flown in violation of the flying regulations of the Toronto Flying Club Limited.”

Two of the “Flying Rules” of the Club are:

“A3. The C.F.I. [The Chief Flying Instructor] is responsible for, and shall personally supervise, all Club flying operations.”

“B6. Before proceeding on a flight outside of the Malton control area a pilot must sign out in the Register provided for the purpose, file a Flight Plan with the C.F.I. and comply with such D.O.T. [Department of Transport] requirements that may be in effect at the time.”

The defendant pleads and argues, *inter alia*, that these two regulations were material to the risk, as I think they undoubtedly were, and that they were breached by the Club and the deceased. It is said that the fatal flight was not supervised by the Club’s chief flying instructor, one Milt McDougall, and that the deceased did not file a flight plan with him before setting out from Malton upon a flight which involved long cross-country flying at night.

Neither side called Mr. McDougall as a witness at the trial. I should have thought that beyond question he would be the man best qualified to say—perhaps the only one who could say—whether the flight in question had been authorized. The plaintiffs sought, however, to prove as part of their case, through the testimony of one Bruce Best, the Club’s chief air engineer, which was taken before the trial, that the flight had been authorized by



Mr. McDougall. Mr. Best testified that he himself had signed the instructor's authorization flight form for the deceased, and all that Mr. McDougall had indicated to him "by phone or by word of mouth, probably the day before" was that an aircraft was to be reserved for the deceased. He added that the deceased had told him (Best) that he intended to fly to Wichita, Kansas, and that he (Best) had prepared the aircraft for the flight. At all events, as I have indicated, the plaintiffs did not call the chief flying instructor to testify, and no reason was advanced for not calling him.

Despite the plaintiffs' unsuccessful attempt to prove that the deceased's flight was authorized by Mr. McDougall, their counsel submit that the burden is on the defendant to prove affirmatively that the regulations of the Club were breached and specifically that the fatal flight was authorized by him. The matter of the *onus probandi* is thus squarely raised.

That the rule that the burden of proving that a loss was caused by a peril excepted from the general risk rests on the insurer is too well established to be doubted, and I share the view of the learned author if Macgillivray on Insurance Law, 3rd ed., 1947, p. 1015, that the rule is applicable to all classes of insurance. In *Munro, Brice & Co. v. War Risks Association, Limited et al.*, [1918] 2 K.B. 78 [see [1920] 3 K.B. 94], Bailhache J. formulated five rules governing the burden of proof and they have never been seriously challenged since. In Ontario they have been approved in a number of cases, including *Luciani v. British America Assurance Co.*, 65 O.L.R. 687 at 695, [1931] 1 D.L.R. 166. These rules, stated in the *Munro, Brice* case at pp. 88-9 are:

"1. The plaintiff must prove such facts as bring him *prima facie* within the terms of the promise.

"2. When the promise is qualified by exceptions, the question whether the plaintiff need prove facts which negative their application does not depend upon whether the exceptions are to be found in a separate clause or not. The question depends upon an entirely different consideration, namely, whether the exception is as wide as the promise, and thus qualifies the whole of the promise, or whether it merely excludes from the operation of the promise particular classes of cases which but for the exception would fall within it, leaving some part of the general scope of the promise unqualified. If so, it is sufficient for the plaintiff to

bring himself prima facie within the terms of the promise, leaving it to the defendant to prove that, although prima facie within its terms, the plaintiff's case is in fact within the excluded exceptional class. Illustrations of this rule are actions against common carriers and the analogous cases in which a promisor undertakes to perform a given act unless excused by certain excepted events, as, for example, a vendor to deliver, strikes excepted; a charterer to load a ship in a given number of lay days, subject to the usual exceptions now found in charter-parties.

"3. When a promise is qualified by an exception which covers the whole scope of the promise, a plaintiff cannot make out a prima facie case unless he brings himself within the promise as qualified. There is *ex hypothesi* no unqualified part of the promise for the sole of his foot to stand upon. As an instance I take a marine policy with the particular average franchise. There, reading the promise and the exception together, the promise is not a promise to pay particular average or to pay particular average except in certain events. It is a promise to pay particular average exceeding 3 per cent. To bring himself within that promise a plaintiff must show more than a particular average loss; he must show a particular average loss exceeding 3 per cent. This is the explanation, I think, of *Dawson v. Wrench*, 3 Ex. 359 [154 E.R. 883], and why that case is no authority for the wide general statement on p. 182 of Bullen and Leake on Pleading, 3rd ed. (1868), and why that case does not conflict with *Wheeler v. Bavidge*, 9 Ex. 668 [156 E.R. 286], or with my suggested rule 2.

"4. Whether a promise is a promise with exceptions or whether it is a qualified promise is in every case a question of construction of the instrument as a whole: see per Palles C. B. in *Gorman v. Hand-in-Hand Insurance Co.*, I.R. 11 C.L. 224.

"5. In construing a contract with exceptions it must be borne in mind that a promise with exceptions can generally be turned by an alteration of phraseology into a qualified promise. The form in which the contract is expressed is therefore material."

These rules are not arbitrary and they must be understood to have been laid down in the circumstances of the cases reviewed by that learned judge. And they are not intended to supersede a proper construction of the insurance policy. It should be noted

at once that the rules are concerned with qualifications, whether wholly or partly, by exception from the specific policy risks, such as the usual exceptions of explosion, earthquake, riot, foreign enemies, incendiarism and the like.

In *British and Foreign Marine Insurance Company, Limited v. Gaunt*, [1921] 2 A.C. 41 at 47, Lord Birkenhead L.C., said: "We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policies; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove *the exact nature of the accident or casualty which, in fact, occasioned his loss.*" (The italics are mine.)

In my opinion, what the defendant company places reliance upon by way of defence in this case is not a qualification of the specific policy risk. The exclusion of night flying is, of course, a qualification of the risk, but compliance with the regulations of the Club has nothing to do with "the exact nature of the accident or casualty". The defendant does not say it is not liable because the deceased was flying at night; it denies liability because the plaintiffs failed to prove that such flying was supervised, and hence authorized, by the Club's chief flying instructor. The argument is that the prohibition against night flying was removed only conditionally, and the defendant stresses the language of para. 9 and also relies upon the language in para. 10 of the endorsement of the policy. In my opinion, upon a true construction of the policy, this argument is sound and must be given effect to.

A further consideration of the rules formulated by Bailhache J. leads me to the same conclusion. I have mentioned generally the circumstances in the cases which have been held to constitute qualifications by exceptions from the specific policy risks, and in the cases reviewed by Bailhache J. it had been held, as he himself held, that it was inequitable to require an insured to negative something about which he could not be expected to have any knowledge. Illustrations make this clear, for example: If the risk insured against is fire, and the fire is proved, it is held to be only just that the insurer show that, although the loss was



caused by fire, the fire was of such a nature as to bring the case within one of the exclusions, as, for instance, that it was a fire caused by earthquake or by incendiarism. Again, as the facts were in the *Munro, Brice* case, *supra*, the Court required the insurer to prove that a claim for a ship lost at sea was excluded from the risk because it came within an exclusion of liability in consequence of hostilities and warlike operations. To require an insured in cases such as these to negative something about which he would be expected to have no knowledge is to place him in a hopeless position, and this consideration, in my opinion, underscores the real reason for the formulation of Bailhache J.'s second rule.

In the *Munro, Brice* case Bailhache J. quotes a passage from the report of perhaps the earliest case of which we have record on this branch of the law, *viz.*, *Green v. Brown*, 2 Stra. 1199, 93 E.R. 1126, decided in 1744. The passage is from the report of the judgment of Lee C.J. and reads: "The underwriter insisted, that as captures and seizures were excepted, it lay upon the assured to prove the loss happened in the particular manner declared on. But the Chief Justice said, it would be unreasonable to expect certain evidence of such a loss, as where everybody on board is presumed to be drowned; and all that can be required is the best proof the nature of the case admits of, which the plaintiff has given; he therefore left it to the jury, who found the loss according to the plaintiff's declaration."

Upon a fair construction of the policy, including the important para. 9 of the endorsement, is it inequitable to ask the plaintiffs to prove, at least *prima facie*, compliance with the Club's regulations? I think not. Until they do that they have not, in the words of Lee C.J. which I have quoted, offered "the best proof the nature of the case admits of". After all, the plaintiffs are not being asked to prove something about which they could not reasonably be expected to have knowledge. On the contrary, the Club and its members are deemed to know their regulations. It was for the Club, in so far as lay in its power, to see that its rules were obeyed by its members, and for the members to see that they obeyed them, and I think the policy shows that the risk of night flying was permitted upon that distinct understanding. I do not mean to be understood to say that the plaintiffs were required as part of their case to negative, *seriatim*, a viola-

tion of every regulation in the Club's book. They knew, however, from the defence set up and from Mr. Best's cross-examination, what Club regulations were alleged to have been violated. If the Club knew that the deceased had been engaged in a supervised flight in connection with his qualification for a commercial pilot's licence, as the plaintiffs pleaded, the fact was not proved. Upon a true construction of the policy, I am satisfied that it was for the plaintiffs to show compliance with those regulations and that until they did so they did not bring themselves within the first rule stated in the *Munro, Brice* case, *supra*, and did not make out a *prima facie* case.

Furthermore, as I have stated, the plaintiffs undertook to prove that the deceased's fatal flight had been properly supervised. Not only did they fail to do so, but if a fair inference is to be drawn from the testimony of Mr. Best, it is that the flight to Wichita at the time it was taken was neither authorized nor supervised by the Club's chief flying instructor.

In view of the result, it is unnecessary to discuss the other defences raised.

The action is dismissed with costs.

*Action dismissed with costs.*

*Solicitors for the plaintiffs: Kennedy & Ross, Toronto.*

*Solicitors for the defendant: Kilmer, Rumball, Gordon, Beatty and Dean, Toronto.*

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[McRUER C.J.H.C.]

**Boland v. Baker and The Township of North York.**

*Highways—Effect of Registration of Plan and Sale of Lots According to Plan—Title to Highways Shown on Plan—Vesting in Municipality—The Registry Act, R.S.O. 1950, c. 336, ss. 84, 89, 90—The Municipal Act, R.S.O. 1950, c. 243, ss. 1(f), 427, 428—The Surveys Act, R.S.O. 1950, c. 381, s. 11.*

The registration of a plan, and the sale of lots according to that plan, together have the effect of vesting in the municipality the title to the streets and highways shown on the plan, without the expenditure of any moneys by the municipality or the passing of a by-law adopting the highways for public purposes. *Re Westwood Addition, Hamilton*, [1945] O.R. 257; *Re Plan 69, Dunnville*, [1950] O.R. 350 applied; *Jones v. Township of Tuckersmith* (1917), 45 O.L.R. 67; *Holditch v. Canadian Northern Ontario Railway Company*, [1916] 1 A.C. 536, discussed.

AN ACTION for damages, and for an injunction.

15th and 16th December 1953. The action was tried by McRUER C.J.H.C. without a jury at Toronto.

A. A. Macdonald, Q.C., for the plaintiff.

C. Frank Moore, Q.C., and Garth H. F. Moore, for the defendants.

S. G. M. Grange, for The Bell Telephone Company of Canada, third party.

16th December 1952. McRUER C.J.H.C. (orally):—This is an action to recover damages in the sum of \$3,960, being the value of the southerly 125 feet of a road allowance shown on Plan 2044, which was duly registered in the Registry Office for the Registry Division of the East and West Ridings of the County of York on the 26th January 1915.

The plaintiff also claims “an injunction restraining the Defendants from giving or granting any further permission to any person purporting to authorize any such person to trespass upon the said road allowance or to create any easement or right of way thereover.”

The plaintiff in his pleading alleges that since the registration of the plan and down to the month of October 1922 all of the lots abutting or fronting on the road allowance in question have been owned by one corporation, and at no time was there any conveyance of individual lots and no person acquired a right of ingress to or egress from or any right over the said road allowance. The pleading then goes on to trace the chain of title down to the plaintiff with respect to those lots that abut on the road



allowance in question between Bombay Avenue and what is now Summit Drive.

According to the plan, the road allowance involved in this action was called Strathmore Avenue, which ran from Armour Boulevard to what is shown as Cawthra Drive. The name of Cawthra Drive has since been changed to Summit Avenue, and by by-law dated the 15th March 1948 the name of Strathmore Avenue was changed to Ridley Boulevard, this being the name of the continuation southerly of Strathmore Avenue as shown on the original plan.

The parties have made certain admissions which are set out in a memorandum filed reading as follows:

"The Parties hereto by their Counsel hereby admit the following facts:

"1. Plan Number 2044 was registered in the Registry Office for the Registry Division of the East and West Riding of the County of York on January 26th, 1915.

"2. Such plan was consented to by the Township of York within whose corporate limits the lands embraced in the plan were then situate. Such consent is endorsed on the said plan.

"3. The Township of North York was incorporated as a separate township on July 18, 1922, and from and since that time the lands embraced in the said plan have been within the corporate limits of the Township of North York.

"3A. Lots have been sold according to the said plan.

"4. Neither the Township of York nor the Township of North York have spent any public money or any money on the development or improvement of the road allowance lying between Bombay Avenue and Summit Drive, shown on the said plan as a part of Strathmore Avenue, and which said road allowance is the subject matter of this action.

"5. Neither the Township of York or the Township of North York has at any time passed any By-law assuming the said road allowance for public uses.

"The right is hereby reserved to each of the parties hereto to adduce evidence on any other matter that may be relevant to the matters in question in this action, but not any evidence in contradiction of any of the above enumerated matters hereby admitted."

According to the statement of claim the cause of action arises out of an alleged trespass by The Bell Telephone Company of

Canada on the road allowance under discussion, which was said to have been authorized by the defendant corporation.

I think for the purposes of disposing of this matter I can assume that the Bell Telephone Company did lay a conduit for their service-wires over the southerly 125 feet of the road allowance, and that the company acted pursuant to permission granted by the defendant corporation.

The defendant corporation pleaded in para. 5 of its statement of defence that it was at all times material to the action the owner of Strathmore Avenue, now Ridley Boulevard, to its northerly limit as laid out on Plan 2044.

At the opening of the trial counsel for the defendant asked leave to argue a point of law raised in this paragraph of the statement of defence. This application I granted and the point of law was argued exhaustively by counsel for the plaintiff and the defendants.

If, according to law and on the admissions made, the defendant corporation is the owner of Strathmore Avenue, the plaintiff obviously has no cause of action and no right to bring an action for trespass.

I shall first discuss the relevant provisions of the statute law before I proceed to refer to the cases that have been discussed in argument.

Section 84 of The Registry Act, R.S.O. 1950, c. 336, provides for the registration of plans where land is subdivided.

Subsection 5 reads as follows: "The plan shall also show all roads, streets, railway land, rivers, canals, streams, lakes, mill-ponds, marshes or other marked topographical features within the limits of the land so subdivided, together with such other information as is required to show distinctly the position of the land."

Subsection 1 reads: "Where land is surveyed and subdivided for the purpose of being sold or conveyed in lots by reference to a plan which has not been already registered the person making the survey and subdivision shall within three months thereafter register a plan of the land on a scale not less than one inch to every four chains."

I point out here that the Legislature in passing that section was contemplating a plan being registered showing land which had been subdivided for the purpose of lots being sold or conveyed by reference to the plan. I think that that has some im-

portance when we examine the provisions of The Registry Act and The Surveys Act.

Section 89(1) reads: "A plan, although registered, shall not be binding on the person registering it, or upon any other persons unless a sale has been made according to the plan, and in all cases amendments or alterations thereof may be authorized or ordered to be made by a judge of the Supreme Court or by a judge of the county or district court of the county or district in which the land lies, on application for the purpose and upon hearing all persons concerned, upon such terms and conditions as to costs and otherwise as may be deemed just."

I pointed out a moment ago that the provisions of s. 84(1) contemplated the registration of a plan on which lots were to be sold according to the plan. Section 89(1) makes provision that there are to be no alterations in a plan after a sale has been made according to the plan except by the procedure laid down, where all persons affected will have an opportunity of being heard. It is also important to observe that an appeal lies to the Court of Appeal from an order of a Supreme Court Judge or a County Court Judge hearing an application.

Section 89(4) reads: "No part of a road, street, lane or alley upon which any lot of land sold abuts, or which connects any such lot with or affords access therefrom to the nearest public highway, shall be altered or closed up without the consent of the owner of such lot; but nothing herein shall interfere with the powers of municipal corporations with reference to highways."

That subsection again emphasizes that the power given to a judge under The Registry Act to close a road may not be exercised without the consent of the owner of a lot abutting on such road. The obvious reason is that an owner is not to be excluded from access to his land. However, the rights of the municipality over highways are preserved, and with that matter I think I need not deal.

Section 90 provides for an application by the council of any municipality to a judge of the County or District Court in which the municipality is situated, and that the judge shall have power to make orders and directions for the hearing of an application upon such notice as the judge directs, and to cancel or suspend in whole or in part a registered plan, to close, divert or alter



any or all highways. It is unnecessary to review all the provisions of this section.

Under s. 1(f) of The Municipal Act, R.S.O. 1950, c. 243, a highway is defined to mean "a common and public highway, and includes a street and a bridge forming part of a highway or on, over or across which a highway passes." That definition is for the purposes of The Municipal Act only.

Sections 427 and 428 of The Municipal Act read:

"427.—(1) Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this or any other Act.

"(2) In the case of a dedicated highway such vesting shall be subject to any rights in the soil reserved by the person who laid out or dedicated the highway.

"428. Except where jurisdiction over them is expressly conferred upon another council, the council of every municipality shall have jurisdiction over all highways and bridges within the municipality."

That brings me to The Surveys Act, R.S.O. 1950, c. 381.

Section 11(1) provides: "Where any city, town, village, lot, mining claim, mining location or part thereof, or any parcel or tract of land has been or may be surveyed and laid out and a plan thereof made by a company or individual in accordance with *The Registry Act* or *The Land Titles Act*, all lines or limits shown thereon and the courses thereof, given in such survey and laid down on the plans thereof and all posts or monuments placed or planted in the first survey of such city, town, village, or part thereof or parcel or tract of land, to designate or define any allowances for road, street or lane, or any commons, lot, block or parcel of land, shall designate and define the true and unalterable lines and boundaries thereof respectively."

Subsection 2 of s. 11 is one of the important provisions of the statute law applicable to this case. It reads: "Subject to the provisions of *The Registry Act* and *The Land Titles Act* as to the amendment or alteration of plans, all allowances for roads, streets, lanes or commons, surveyed in any such city, town, village, lot, mining claim, mining location or any parcel or tract of land or any part thereof, which has been or may be surveyed and laid out by companies or individuals and laid down on the

plans thereof *shall be public highways, streets, lanes and commons.*" (The italics are mine.)

Subsection 4 is also important: "Where under subsection 2 an allowance for a road, street or lane laid down upon a plan is a public highway but the municipal corporation has not assumed it for public use, and the allowance or any part thereof is closed by an alteration of the plan under *The Registry Act, The Land Titles Act* or other provisions in that behalf, the allowance or part thereof so closed shall belong to the owners of the land abutting thereon."

Subsection 9 makes provision for the conveyance of the fee in a road allowance so closed. It reads: "Where any allowance for a road, street or lane is closed under this section, it shall be the duty of the corporation of the municipality in which the allowance for such road, street or lane was vested to execute a conveyance to each owner of that portion of the road allowance which belongs to him under this section, and the corporation shall register the conveyance in the proper registry or land titles office."

Subsection 10 reads: "The cost of preparing and registering the conveyance shall be borne by the municipal corporation."

There was a change in *The Surveys Act* in 1920 by 10-11 Geo. V, c. 48, when subss. 1, 2 and 4 of s. 13 (now s. 11) were enacted in the form in which they now appear. This substantially altered the wording of s. 44 of R.S.O. 1914, c. 166. Subsection 1 as it was in 1914 read as follows: "Subject to the provisions of *The Registry Act*, as to the amendment or alteration of plans, all allowances for roads, streets or commons surveyed in a city, town, village or township, or any part thereof, which have been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof, and upon which lots fronting on or adjoining such allowances for roads, streets, or commons have been or may be hereafter sold to purchasers, shall be public highways, streets and commons." The words "have been or may be hereafter sold to purchasers" do not appear in the amendment of 1920 and the succeeding revisions of the statutes.

Before leaving the provisions of s. 11 of *The Surveys Act* I point out that in the provision of subs. 9 for the conveyance of the portion of the road allowance to the adjoining owners, where a road allowance has been closed under the provisions of *The Registry Act*, we find the words "was vested"; that is, the

municipality in which the land was vested executes the conveyance.

It is probably quite unnecessary for me to review this legislation because it was obviously considered in detail by Robertson C.J.O. in *Re Westwood Addition, Hamilton*, [1945] O.R. 257, [1945] 2 D.L.R. 300. When one reads the argument in that case and the judgment of the learned Chief Justice it becomes quite clear that everything that was said or that could be said on behalf of the plaintiff in this action was said in that case.

As I conceive the plaintiff's contention it is that, as long as the road allowance was not developed by the municipality as a highway and remained in its original condition, the fee in the road allowance did not vest in the municipality, and that it either remained in the original owner of the subdivision or vested in the owners of the adjoining lots. I will assume for the purposes of my judgment that the plaintiff has obtained a conveyance from the original owner of the subdivision of all his interest in the road allowance here in question, and on that assumption consider the judgment in *Re Westwood Addition, Hamilton*. At p. 263 the learned Chief Justice said:

"There was formerly a good deal of judicial controversy as to the effect proper to be given to the several statutory provisions then in force in relation to the character and ownership of land laid out as highways by private persons and companies on registered plans of subdivision, and in regard to the jurisdiction to close them, where they had not been adopted for public use by the municipality in which they lie. The cases of *Roche v. Ryan* (1892), 22 O.R. 107, and *Jones v. Township of Tuckersmith* (1915), 33 O.L.R. 634, 23 D.L.R. 569, reversed 45 O.L.R. 67, 47 D.L.R. 684, will serve to indicate the nature of the questions that arose. The provisions of The Registry Act, The Surveys Act and The Municipal Act—all dealing, in some manner, with the same subject-matter—make a complex situation, and the inconsistent decisions upon them resulted in a good deal of confusion."

With great respect, it seems to me that the argument presented to me on behalf of the plaintiff would lead to perpetuate that confusion, but I do not think it is open to me to do so now, in view of the decisions that are binding on me. The learned Chief Justice went on:



"There have been important amendments in the legislation since the cases that I have referred to were decided, more particularly in The Surveys Act and in The Municipal Act. Some matters that were formerly obscure have now, I think, been cleared up. (See The Surveys Act, 1920, 10-11 Geo. V, c. 48.)

"It is not necessary, for the purposes of the present case, to determine where the ownership of the allowances for roads shown on such a plan as we have here lies, after registration of the plan but before any sale is made according to the plan. Section 88(1) of The Registry Act says that a plan, although registered, shall not be binding upon the person registering the same, or upon any other persons, unless a sale has been made according to such plan, and it may well be that until such a sale is made the allowances for roads shown on the plan remain vested in the owner by whom the plan was registered. There has been here, however, a sale according to the plan."

And that is the position that I am in in this case; there has been a sale according to the plan. To adopt the words of the learned Chief Justice on p. 264:

"This plan must, therefore, I think be considered to be a plan that became binding on the owner and upon the applicants, when the sale was made to the applicants, but subject to whatever amendments or alterations a judge might make, upon application to him. This is, I think, the result, by virtue of subs. 1 of s. 88 of The Registry Act."

Then, if I may quote further from the judgment in this case, because I think it encompasses all the problems that are involved in the case I have before me:

"Reading these provisions of The Surveys Act along with the provisions of The Municipal Act (see ss. 453, 454 and 455), it is, in my opinion, their plain effect that the municipality is to be deemed the owner of allowances for roads and streets laid down on the plan of a subdivision, such as we have here to deal with, whenever the plan has become binding upon the owner, and this regardless of the fact that the municipality may not have assumed the road or street for public use. The fact that the municipality is required to make a conveyance to the abutting owners when a road or street, or part of a road or street, has been closed by the alteration of the plan under The Registry Act or The Land Titles Act, is consistent only with that inter-

pretation of the several statutory provisions that deal with the matter.”

Again on p. 265, after referring to *Roche v. Ryan, supra*, and the opinion of Mr. Justice Street therein, Robertson C.J.O. goes on to say: “We have not to deal with that situation here. In my opinion, the plan in question became binding upon the owners and upon the applicants: the allowances for roads and streets shown upon the plan became vested in the municipality, but (except as to the strip adjoining Stroud Road) were not assumed by the municipality for public use: the County Judge had jurisdiction under s. 88 of The Registry Act to make an order amending or altering the plan, as the applicants asked, and the consent of the municipality was not essential to the making of such an order.”

The matter is dealt with again in our Court of Appeal in *Re Plan 69, Dunnville*, [1950] O.R. 350 at 355, [1950] 2 D.L.R. 688, where Roach J.A. says: “An owner of acreage may cause it to be subdivided and register the plan of subdivision. The streets laid out on the plan thereby become public highways subject to the provisions of The Registry Act and The Land Titles Act . . . as to the amendment or alteration of the plan: see s. 12(2) of The Surveys Act, R.S.O. 1937, c. 232. The title to the land included in the highways laid out on the plan is vested in the municipal corporation even though the corporation does not adopt those highways for public use, subject to it being divested in the circumstances referred to in s. 12(4) of The Surveys Act.”

Those two judgments are very plain in their language and there is nothing ambiguous that I can find in them.

Mr. Macdonald relies strongly on a judgment of the Supreme Court of Canada in *Jones v. Township of Tuckersmith*, cited in the passage quoted from *Re Westwood Addition, Hamilton, supra*, I have read this case carefully, and even though it is to be taken as a judgment of a Court superior to the Ontario Court of Appeal, I do not think that it conflicts with the judgment of the Ontario Court of Appeal—in fact, Chief Justice Robertson considered it in his judgment in the *Westwood* case and he was counsel for one of the parties in *Jones v. Township of Tuckersmith*. There are some statements in the judgment of Idington J., with whom Fitzpatrick C.J.C. agreed, that are stressed by Mr. Macdonald. They, however, do not persuade me against the clear

reasoning of Chief Justice Robertson and Mr. Justice Roach. Anglin J., with whom Davies J. agreed, approached the subject-matter of the case from a different point of view. Brodeur J. did not express an opinion. Mr. Justice Anglin's judgment at p. 77 (45 O.L.R.) contains the following words:

"The effect of laying out a property in separate lots after registration of a plan, which has become binding as a result of sales made according to it, was recently much considered in *Canadian Northern Ontario R. W. Co. v. Holditch* (1914), 50 Can. S.C.R. 265, 20 D.L.R. 557; *Holditch v. Canadian Northern Ontario R. W. Co.*, [1916] 1 A.C. 536, 27 D.L.R. 14. The view there taken seems scarcely consistent with the idea that, merely because two lots on such a plan adjoin one another, they should be treated as one property."

The question under consideration in the *Holditch* case was whether damages would be recovered against the railway company by reason of severance of land where the land had been subdivided into lots, and although the statement in the judgment of Lord Sumner may be, for the purpose of this case, *obiter*, it is an *obiter dictum* that I feel I would be bound to follow in any case. Unfortunately, the library here has not the volume [1916] 1 A.C., but I have the judgment in 85 L.J.P.C. 107, and Lord Sumner said at p. 109:

"The whole property had been surveyed and divided into building lots, and a plan shewing the lay-out had been duly registered. The roads and streets had thus become public highways by force of the surveys and registry statutes applicable, but had not been made up."

That is very strong language and very definite language, and I can see no reason why I should follow the argument based on Mr. Justice Idington's judgment in *Jones v. Township of Tucker-smith*, and the judgment in *Gooderham et al. v. The City of Toronto* (1895), 25 S.C.R. 246, where statutes were being considered that were in different form from the statutes that we have to-day and where the point that we have to-day was not being dealt with, nor was the same type of relief sought as I have to deal with.

I have therefore come to the conclusion that on the law that portion of the road allowance formerly known as Strathmore Avenue, now known as Ridley Boulevard, on which the defendants are alleged to have authorized the Bell Telephone Company



to lay their conduits was not vested in the plaintiff and that he had no interest in it giving him a foundation for an action for damages as set out in the pleadings. The action will therefore be dismissed as against both defendants with costs.

The defendants commenced third party proceedings against The Bell Telephone Company of Canada. In the third party notice the defendant claimed to be entitled to be indemnified by the third party for "all damages and costs which the Defendants may be ordered to pay to the Plaintiff in this action on the ground that the damages referred to in the Statement of Claim arose as a result of the acts of The Bell Telephone Company of Canada in digging, or causing to be dug, trenches, and laying conduits for its service wires therein on the south one hundred and twenty-five (125') feet of a road allowance shown on Plan 2044 as Strathmore Avenue, now Ridley Boulevard, between Bombay Avenue and Summit Drive in the Township of North York". I am going to ask counsel to present argument as to why the plaintiff should be asked to pay the costs of the third party proceedings, if there is any argument to be presented. [After some discussion with counsel, and with their consent, his Lordship concluded as follows:]

The action will be dismissed. As to costs of the third party proceedings I make no order, reserving to counsel the right to speak to me in the future.

*Action dismissed with costs.*

*Solicitor for the plaintiff: Irvine P. Dickler, Toronto.*

*Solicitor for the defendants: C. Frank Moore, Toronto.*

*Solicitors for the third party: Heighington, Symons & Grange, Toronto.*

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## [COURT OF APPEAL.]

## Shackleton v. Hayes.

*Sale of Land — Sufficiency of Proof of Contract — Alleged Acceptance of Offer — Changes Made in Document before Acceptance — Action for Specific Performance — Whether Acceptance Unconditional — Whether Parties ever ad idem — Conduct of Plaintiff Disentitling him to Equitable Relief.*

The plaintiff sued for specific performance of an agreement for the sale to him of a farm. The contract set up was contained in a written offer to sell signed by the defendant, and an acceptance signed by the plaintiff after he had made changes in the document. *Held*, the action must fail on the following grounds:

1. On the evidence, it could not be found that the defendant had agreed to all the changes made by the plaintiff in the written offer. The offer that the plaintiff purported to accept had not in fact been open for acceptance by him, and thus no binding contract had been constituted.
2. The plaintiff's purported acceptance of the offer had not been unequivocal, unconditional and unqualified, but had been made subject to a condition, which was not accepted by the defendant, and this was another factor that prevented the formation of a binding contract. *Fulton Bros. v. Upper Canada Furniture Company* (1883), 9 O.A.R. 211, quoted and applied.
3. The written document was silent as to a date for completion of the contract and delivery of possession, and the circumstances were such as to preclude the implication by law of a term that the contract should be completed within a reasonable time. *Thomson Groceries Limited v. Scott*, [1943] O.R. 290 at 293, quoted and applied; *McKenzie v. Walsh* (1921), 61 S.C.R. 312, distinguished. The parties were therefore never *ad idem* as to an important term of the alleged contract between them.

Further, although this was not made a ground of the judgment, the plaintiff's conduct was such as to disincline the Court to grant him equitable relief.

AN APPEAL by the defendant from the judgment of Spence J., decreeing specific performance of an agreement for the sale of a farm to the plaintiff.

12th and 13th January 1953. The appeal was heard by PICKUP C.J.O. and AYLESWORTH and GIBSON JJ.A.

W. J. Smith, Q.C. (J. N. Lindsay, with him), for the defendant, appellant: There was never a plain, unequivocal, unconditional and unqualified acceptance of our offer to sell, such as is required to complete a binding contract. The payment of \$18,000 in cash was an integral part of the acceptance, even of the amended offer, and was in fact a condition precedent: *Bishop v. Gray*, [1944] O.W.N. 435, [1944] 3 D.L.R. 541, affirmed [1944] O.W.N. 700, [1944] 4 D.L.R. 743; *Cushing et al. v. Knight* (1912), 46 S.C.R. 555 at 561, 6 D.L.R. 820, 2 W.W.R. 704; *Miller v. Allen* (1912), 4 O.W.N. 346 at 347, 23 O.W.R. 527, 7 D.L.R. 438. The purported acceptance, whereby the

plaintiff required a receipt for the \$18,000, was not an acceptance of the offer, because it introduced a new material term, *viz.*, the closing date; it was in reality a counter-offer, which was never accepted. The parties were never *ad idem*, and there was therefore no binding contract.

To constitute a binding contract there must be acceptance of the offer in plain, unequivocal, unconditional and unqualified language: Fry on Specific Performance, 6th ed. 1921, p. 132; *Fulton Bros. v. Upper Canada Furniture Company* (1883), 9 O.A.R. 211 at 213; *Oppenheimer v. The Brackman & Ker Milling Company, Limited* (1902), 32 S.C.R. 699 at 708, 717; *Routledge v. Grant* (1828), 4 Bing. 653, 130 E.R. 920; *Jones v. Daniel*, [1894] 2 Ch. 332 at 335; *Crossley v. Maycock* (1874), L.R. 18 Eq. 180. The tender here was conditional in that the defendant was required to sign a receipt accepting a new term.

The offer, dated 25th February 1952, to sell for \$30,000 was in fact revoked on 1st March, and the plaintiff purported to accept a new offer to sell for \$28,000 with a cash payment of only \$18,000 instead of \$20,000. This new offer, however, was never signed by the defendant, unless the initials of his sister, referable to the changes, could be said to be a signature. There was no evidence that the sister had authority to sign the written memorandum as agent for the defendant, and even if the agency was established the initials, appearing as they do in the margin at the middle of the document, and referring only to the changes in the figures, do not constitute a proper signature of the defendant within the meaning of s. 4 of The Statute of Frauds, R.S.O. 1950, c. 371: Williams, *The Statute of Frauds*, Section Four, 1932, pp. 93, 117; Agnew, *The Statute of Frauds*, 1876, p. 281. The Statute of Frauds was not pleaded in our statement of defence, but we raised it as one of our grounds of appeal, and I ask leave to amend the statement of defence so as to set it up now. The only change to which the defendant agreed was a reduction in the total purchase-price from \$30,000 to \$28,000. There was no authority to change the amount of the cash payment.

Even if it is held that there was a good offer and a good acceptance thereof, the contract is still unenforceable because a material term, the date of possession, was left in the air. The parties were never *ad idem* as to this term: Fry, *op. cit.*, p. 173,



s. 372; *Thomson Groceries Limited v. Scott*, [1943] O.R. 290 at 293, 295, [1943] 3 D.L.R. 25; *Murphy v. McSorley and Prince Edward Hotels Limited*, [1929] S.C.R. 542, [1929] 4 D.L.R. 247; *G. Scammell and Nephew, Limited v. Ouston*, [1941] A.C. 251 at 269, [1941] 1 All E.R. 14; *Geary v. Clifton Co. Ltd.*, 62 O.L.R. 257, [1928] 3 D.L.R. 64. The purported contract, as it appears in the appeal book, is an open contract. By the application of s. 4 of The Vendors and Purchasers Act, R.S.O. 1950, c. 407, the closing date would not be until after the date of the trial. Alternatively, the time for closing might have been fixed by the plaintiff giving reasonable notice thereof to the defendant: 7 Halsbury, 2nd ed. 1932, p. 193. This was not done.

The defendant's conduct might have been considered an anticipatory breach of the contract, entitling the plaintiff to sue immediately for damages, but he elected to treat the contract as subsisting, and to sue for specific performance. It is now settled that an action for specific performance may be brought before the date of closing: *Kloepfer Wholesale Hardware and Automotive Company Limited v. Roy*, [1952] 2 S.C.R. 465, [1952] 3 D.L.R. 705; *Roberto v. Bumb*, [1943] O.R. 299, [1943] 2 D.L.R. 613. But an action at law for damages in the circumstances here existing could not be brought until after the date for completion, since the defendant was entitled at any time before that date to re-elect and go on with the contract, and would also be entitled to set up any defences that might arise in the meantime. Consequently the plaintiff's cause of action for damages in this case was non-existent when the writ was issued, and even at the date of trial: *Oppenheimer v. The Brackman & Ker Milling Company, Limited*, *supra*; *Dalrymple v. Scott* (1892), 19 O.A.R. 477 at 484, 487; *Macnaughton v. Stone*, [1949] O.R. 853 at 858, [1950] 1 D.L.R. 330; 7 Halsbury, 2nd ed. 1932, para. 313, p. 228.

*E. B. Thompson, Q.C.*, for the plaintiff, respondent: We never got so far as communicating the condition as to the time of closing to the defendant. The plaintiff indicated that he had something for the defendant to sign, and endeavoured to hand it to him, but he just walked away. This was not a conditional acceptance, since the condition was not communicated.

The closing date is not essential for specific performance. It is in the nature of an appointment to carry out the contract.

If the parties cannot agree, The Vendors and Purchasers Act applies: *McKenzie v. Walsh*, 61 S.C.R. 312, 57 D.L.R. 24, [1921] 1 W.W.R. 1017; *Rowe et al. v. Fidelity-Phenix Fire Insurance Company of New York*, [1944] O.W.N. 387, [1944] 3 D.L.R. 441, 11 I.L.R. 173, reversed [1944] O.W.N. 600, [1944] 4 D.L.R. 265, 11 I.L.R. 266. [AYLESWORTH J.A.: The question of possession was in the minds of the parties throughout, and therefore it was a material term of the contract and should have been in the memorandum to constitute compliance with The Statute of Frauds.] The law implies a reasonable time for closing by The Vendors and Purchasers Act. [AYLESWORTH J.A.: The law does not imply anything if the parties are actually not *ad idem*.] If the parties cannot agree it is a matter for the Court.

[PICKUP C.J.O.: We do not need to hear you on The Statute of Frauds, since we do not propose to allow an amendment.] A cause of action for damages and specific performance is not inconsistent. [AYLESWORTH J.A.: That is not the point; the point is that if you treat the contract as subsisting you cannot claim damages until the time for performance is past.] The law implies that the time for completion would be within a reasonable time. Even if there was not a complete cause of action at the time of trial it is sufficient if the cause of action is completed by the date of judgment: *Roberto v. Bumb*, *supra*.

A written offer may be accepted orally, and when it is so accepted the contract becomes a written one sufficient to satisfy The Statute of Frauds: Fry, *op. cit.*, pp. 142-3; *Ellis v. Abell* (1884), 10 O.A.R. 226.

I have a cross-appeal as to damages. The damages are continuing; we have been delayed for a whole season in getting possession. There should be a reference to assess damages to date. [PICKUP C.J.O.: Damages for breach of contract are fixed for all time. That is the end of the matter if we find that damages were properly awarded at all.]

*W. J. Smith, Q.C.*, in reply: I do not quarrel with the proposition that there may be an oral acceptance, but the question is one of intent, and my argument is that there was no true offer and acceptance in this case.

28th January 1953. The judgment of the Court was delivered by

PICKUP C.J.O.:—This is an appeal from the judgment of Spence J. pronounced on the 15th May 1952, in an action brought by the respondent against the appellant for specific performance of an alleged agreement for sale of land. The learned trial judge declared that there was a binding contract for sale of the lands in question, together with all tile and fencing material on the lands, at the price of \$28,000, payable \$18,000 in cash on the 25th March 1952, and \$10,000 to be secured by a mortgage upon the lands, such mortgage to be payable on demand. A reference was directed to the Local Master at Stratford to direct closing of the sale, to fix adjustments between the parties, which adjustments would be either deducted from or added to the cash payment of \$18,000, which cash payment (if there was a contract between the parties) was payable at the time of acceptance of the offer or option in question in the action. The order of the Court below further directed that upon payment or tender of such sum, and upon execution and delivery of a mortgage for \$10,000, the appellant should convey the property. The trial judge also awarded to the respondent token damages of \$100.

The appellant called no evidence at the trial and relied upon his motion for non-suit, which was dismissed by the learned trial judge. This appeal must, therefore, be determined upon the evidence adduced by the respondent. I take the facts from the evidence of the respondent.

The respondent is a business-man carrying on business in Stratford as an implement-dealer and sales-agent. He is also the owner of a farm, carrying on both his business in Stratford and his farming operations. At the time of the trial he was residing in Stratford, but prior to taking up residence in Stratford he appears to have resided on his farm. The appellant is a farmer.

On the 25th February 1952 there was a discussion between the appellant and the respondent as to purchase by the respondent of the appellant's farm. At this time the respondent said to the appellant that if he, the respondent, could sell his farm, he would buy the appellant's farm, and asked the appellant



what he wanted for it, to which the appellant replied \$30,000. The respondent then said that if he could sell his farm, he would buy the appellant's farm, and the appellant said, all right, he would sell. This discussion took place at the respondent's place of business, and on the same evening he went to the appellant's farm, taking with him two copies of a printed form of offer to sell land. After some further discussion the appellant signed two copies of an offer to sell his farm to the respondent, together with tile and fencing material, at the price of \$30,000 with \$20,000 payable in cash on the acceptance of the option and the balance by a mortgage for \$10,000, with interest at 4 per cent. per annum. The offer was silent as to any date for possession or the terms of the mortgage, other than the rate of interest. It was to be irrevocable for a period of 30 days. One copy of this offer, signed by the appellant but not by the respondent, was left with the appellant, and the other copy, similarly signed, was taken by the respondent. Both copies were put in as exhibits, but, as signed by the appellant on the 25th February, they were not in the form in which they now appear. Two changes were made by the respondent on 1st March. The price was changed from \$30,000 to \$28,000 and the cash payment was changed from \$20,000 to \$18,000. How this came about will later appear.

When the matter was discussed between the parties at the time the offer was signed by the appellant, the respondent puts it this way:

"The terms at that time were discussed in this way, that he wanted cash for his farm and since I was going at this without sufficient cash on hand to pay him full cash, I said, 'In the event I can't raise the cash for you will you take a mortgage?' He said he would."

The respondent came back to the appellant's farm a couple of days later pursuant to a promise made by him to the appellant to keep in touch with the appellant to let him know what was happening because he (the respondent) had to have possession in a reasonable time for seeding. At this time the respondent told the appellant that he thought he had a buyer for his farm, that is, the respondent's farm. After that the respondent went to see the appellant "a couple or three times" to try to get the appellant to give him the possession date,

this apparently without success. The dates when these interviews took place are not stated, but it would appear from the evidence that there was some discussion about possession after 25th February and before 1st March.

On 1st March the respondent again went to see the appellant. At this time he had a purchaser for his farm, and he was seeking to get a reduction in the option price of \$30,000, and it is important to note what he said on that occasion to the appellant. Again I quote from the respondent's own evidence:

" . . . I said to him, my buyer will not give me \$20,000, but he has made me an offer and it is cash, which means that I can give you cash for yours. I will have to have a reduction of yours to \$28,000. I am losing \$3,000 on my farm. I just ask you to lose two."

He says the appellant agreed. After the appellant agreed the respondent informed him that they would "have to change the price on this agreement".

This interview took place in the basement of the appellant's house, and after the appellant agreed to change the price to \$28,000 the respondent, on his copy of the offer which he had with him, and which had been signed by the appellant on 25th February, struck out the price of \$30,000 and substituted therefor \$28,000, but without any discussion about the cash payment which was to be made on acceptance, he also changed the cash payment to \$18,000, leaving unchanged in the offer the provision for the \$10,000 mortgage. Although this change in cash payment does not appear to have been discussed with the appellant, the appellant was present when the change was physically made in the respondent's copy.

Having made these changes the respondent then suggested to the appellant that, because the appellant's hands were all grease, the appellant's sister would sign for him, to which the appellant appears to have agreed. The respondent then went upstairs and informed the sister that they were making a change in the agreement. His words were, "We are changing this agreement, \$2,000 less, and I will have to have your copy." The sister then got the appellant's copy; the respondent made similar changes in it, and the sister of the appellant initialled in the margin both of the changes. According to the respondent's evidence given on examination-in-chief, there was no further

discussion at this time about the possession date, but on cross-examination the respondent stated that possession was discussed at the time when the two copies of the offer were signed, and that it was more or less left up in the air.

Nothing further occurred until the 25th March, except that the respondent, on some occasions, made inquiries of the appellant as to his finding a house to live in. Evidently the respondent was concerned about the date of possession. It would seem to be clear from the evidence that the possession date was regarded as important, and that the parties had never been able to come to agreement on it.

On the day before the 25th March the respondent again inquired of the appellant as to how the appellant was getting along with finding a house, and the appellant complained that he could not find one. At this time the respondent had not accepted the offer which he had. After this interview between the parties on the day preceding 25th March the respondent, according to his evidence, went to see a solicitor because, as he says, he "couldn't get any definite date as to when [the appellant] was going to complete the agreement". It is significant that at this time there plainly was not any agreement obligating the respondent to buy.

After consulting his solicitor the respondent signed the form of acceptance appearing on his copy of the offer. This is dated 25th March 1952, but the respondent wrote, or caused to be written, in pen below his signature the following words: "I hereby acknowledge receipt of the sum of \$18,000.00 above mentioned and agree to close this transaction on or before April 1st, 1952."

With his document in his possession he again went to see the appellant on 25th March, taking with him \$18,000 in cash, and with the document in one hand and the bag of money in the other, he said to the appellant, "I have brought you \$18,000. I have here a copy of our agreement for you to accept", and "I have come to complete my agreement." The appellant asked him how much money he had, to which the respondent replied \$18,000. The appellant told him that was not enough money, and that the price was \$30,000. Upon the respondent reminding the appellant that he had agreed to reduce the price to \$28,000, the appellant admitted that he had, but said he should not have done so. Upon the appellant refusing to take the \$18,000, the



respondent left, taking with him his copy of the offer, which was the only copy upon which he had written his acceptance, as well as the money which the appellant had refused to accept.

The question to be determined is whether, from the foregoing state of facts, there was a binding contract for purchase and sale of the appellant's lands reached by what had taken place. The learned trial judge finds there was.

While, in his examination-in-chief and in cross-examination, the respondent never at any time said that the appellant, on 1st March, had agreed to anything more than a reduction in the price from \$30,000 to \$28,000 (and they were discussing a cash basis), he did say on re-examination that when he made the changes in the basement on his copy of the offer, the appellant was standing right beside him, saw him make *the change* and saw *the change*. This evidence is not, in my opinion, of sufficient weight to justify a finding that the appellant appreciated that the respondent was making in the document changes which they had not discussed. No doubt, the appellant was standing beside the respondent and looking at him when he made the changes that were made in the basement, but in the absence of anything said at the time I would not assume or infer that the appellant actually read what the respondent was writing, or that he knew that the respondent was asking him to concur in any change beyond a change in the purchase-price from \$30,000 to \$28,000 on the respondent's statement that he could pay all cash. The appellant may well have relied upon the respondent to make the change, and only the change, which had been discussed.

The respondent's position is not improved, in my opinion, by the fact that the appellant's sister initialled both of the changes in the document, because any authority which she had arose solely out of the appellant's concurrence in her signing for him. This must be limited to an authority to authenticate the changes which had in fact been agreed upon between the appellant and the respondent. Upon the evidence I cannot concur in finding that the appellant, on the 1st March, actually agreed to any change other than a change in price from \$30,000 to \$28,000.

The evidence of the witness Wilmot was relied upon by counsel for the respondent, where the witness says, referring to the occasion when the money was tendered on 25th March:

“Q. What took place in the kitchen? A. Mr. Shackleton said, ‘Mr. Hayes, I have come to complete our bargain or our agreement. I have brought you \$18,000.’ He opened the bag and handed it to Mr. Hayes, along with a paper. He said, ‘I have brought the agreement with me.’

“Q. Where did he have this paper? A. He had it in his hand along with the bag. He handed him the paper with one hand and the bag with the other.

“Q. Did Mr. Hayes take either? A. No, he didn’t. He would have nothing to do with it. He said, ‘That is not enough money.’ Mr. Shackleton said: ‘Did you not agree to settle for this much money.’ Mr. Hayes said, ‘Yes, I did, but I should not have.’

“Q. You say Mr. Shackleton said, ‘Did you not agree to settle for this much money?’ A. That’s right.

“Q. Was there any amount mentioned, or do you recall any amount? A. Yes, there was. He mentioned \$28,000 and \$18,000 to be paid by cash.

“Q. You say Mr. Hayes’s reply was—yes, what was it again? A. He said, ‘Yes, but I should not have.’ ”

This evidence is different from the evidence of the respondent in that it makes reference to the figure of \$18,000 whereas the respondent himself does not. I do not consider this evidence sufficient to justify a finding that the appellant had, prior to that time, agreed to anything more than a reduction of the purchase-price from \$30,000 to \$28,000.

On the evidence, with all respect to the learned trial judge, I have come to the conclusion that no agreement was reached between the parties on 1st March whereby there was thereafter, during the option period, an offer by the appellant to sell his farm for \$28,000 with only \$18,000 cash. I do not think there was any such offer open to acceptance by the respondent within the option period, and it follows that what took place on 25th March, when the respondent proceeded on the assumption that he could create a binding contract by tendering the sum of \$18,000 and offering an acceptance of the changed document, did not accomplish that result.

The appellant argues that even if there was agreement between the appellant and the respondent on the terms of the document as changed on 1st March, there never was any legal acceptance thereof by the respondent within the time limited for such acceptance. He argues that what took place on 25th March did not amount to an unequivocal, unconditional and unqualified acceptance. The learned trial judge has found that there was such acceptance, but there is no dispute about the facts as to what took place on 25th March. The question is whether what took place amounted to an unequivocal, unconditional and unqualified acceptance. I do not think it does. Payment or tender of the money was an integral part of the acceptance. In offering the sum of \$18,000 the respondent was requiring the signature of the appellant to the document he had in his hand. That document had written on it beneath the signature of the respondent a term requiring the transaction to be closed on or before 1st April 1952, and the respondent was asking the appellant to agree to that closing date. There is no suggestion in the evidence that there had been any agreement between the parties to that effect. The respondent did not tender an acceptance or the money free from the term which he was adding, and by his conduct on that occasion, as well as before that, does not appear to have been willing to accept an offer in which, by law, might be implied a reasonable time for completion. I think what the respondent was trying to do was to qualify his acceptance so that the parties would be bound by a contract to close on or before 1st April. It is true that the appellant at that time refused to carry out the transaction, but that does not relieve the respondent from unqualifiedly accepting what offer, if any, there was open for acceptance, if he desired to hold the appellant bound by agreement. Counsel for the respondent argues that what was written below the signature of the respondent on the document was 'merely a suggestion as to the closing date, and that in any event it could not qualify the acceptance because the appellant was not informed of the fact that those words were written on the document. I cannot regard the addition of these words as being merely a suggestion as to a closing date. They were in the form of an agreement to be signed by the appellant as part of the respondent's acceptance. I do not think the fact that



the appellant did not know what he was being asked to sign in any way alters the situation. The fact is that he was being asked to sign, contemporaneously with the acceptance, an agreement which he had not made. That, in my opinion, renders the purported acceptance equivocal, conditional or qualified. The respondent, when he found the appellant unwilling to take the money and sign what he was being asked to sign, could have, if he had wanted to, unequivocally, unconditionally and unqualifiedly accepted the offer (assuming the offer as changed on 1st March to be then open for acceptance) by making it plain to the appellant that he was offering the money and requiring nothing but a receipt, and that he was accepting the offer without requiring any further agreement from the appellant. This, he did not do.

Adopting the words of Lord Westbury in *The Oriental Inland Steam Company (Limited) v. Briggs* (1861), 4 DeG. F. & J. 191, 45 E.R. 1157, as quoted with approval by Chief Justice Spragge in *Fulton Bros. v. Upper Canada Furniture Company* (1883), 9 O.A.R. 211 at 213, it is extremely desirable "to adhere strictly to the rule of the Court that whoever brings forward a contract, as constituted of a proposal on one side and an acceptance on the other, should show that the acceptance was prompt, immediately given, unqualified, simple and unconditional". I am, therefore, of the opinion, with due respect to the learned trial judge, that there was not such an acceptance on 25th March as constituted a contract, even if, on 1st March, there was agreement between the parties whereby the respondent had the right to accept an offer from the appellant at the price of \$28,000 with \$18,000 cash payment.

Another argument presented to us on behalf of the appellant was that on the facts as hereinbefore related there was not a sufficient memorandum in writing to constitute compliance with The Statute of Frauds, R.S.O. 1950, c. 371. This defence was not raised by the pleadings or at the trial, and on the hearing of the appeal the Court refused to permit amendment at this stage.

Counsel for the appellant raised a further argument which is quite formidable. It is that the parties were never *ad idem* as to an important term of the contract, namely, the date for delivery of possession. In other circumstances this term might

be implied by law, but I do not think it can be implied in the facts of this case, where the evidence shows that the possession date was something which the parties had, as the respondent says, "left up in the air". The respondent was not willing to be bound by a contract which left the sale to be closed within a reasonable time. He had endeavoured to get the appellant to agree upon a date for closing, but without success. He wanted possession in time for seeding. It was not a term which was merely omitted from the document, but was, I think, a term which, on 25th February, it was intended the parties should later agree upon, and which the parties were later unable to agree upon. It was, I think, because this important term had not been agreed upon, and the respondent knew it, that he was endeavouring to get the appellant to come to agreement with him on it, and to sign the memorandum written below the respondent's signature to his acceptance.

In this connection counsel for the respondent relies upon the case of *McKenzie v. Walsh*, 61 S.C.R. 312, 57 D.L.R. 24, [1921] 1 W.W.R. 1017, but I think that case is clearly distinguishable. There the Court was considering the sufficiency of a memorandum to answer The Statute of Frauds. It was an open contract for sale of land and the Court considered the memorandum to be sufficient compliance with the statute, although there was no time specified for closing the transaction or delivery of possession. There was nothing in that case indicating that when the memorandum was signed the date for delivery of possession was left open as being something not agreed upon. The agreement was merely silent on the matter. In such circumstances an agreement to close and deliver possession within a reasonable time might be implied, but such a term cannot be implied where, as here, it appears that the matter was discussed and the parties failed to reach agreement.

This distinction was recognized in the judgment of Kellock J.A. (as he then was) in the case of *Thomson Groceries Limited v. Scott*, [1943] O.R. 290 at 293, [1943] 3 D.L.R. 25, where the learned judge said: "Apart from the lease and the letter there were no discussions between the parties as to any term of the option or the agreement resulting from its acceptance, and there is no contention between the parties as to what was agreed upon. The case, therefore, is not one of an agreement

incomplete in fact because of something left to be the subject-matter of future discussion, or future arrangement, nor is it one where there is a dispute as to what had in fact been agreed upon. The issues, therefore, are whether the agreement constituted by the acceptance of the option is valid in law, and as to the application of The Statute of Frauds."

I am, therefore, in agreement with the contention of the appellant that in the instant case the parties never were *ad idem*.

I think I may fairly add that in this case the respondent is seeking equitable relief, and I am not impressed with his conduct as he comes to the Court for relief. He was a businessman dealing with a farmer about 70 years of age who, if not deaf, was hard of hearing. He endeavoured to induce the appellant to reduce the purchase-price by holding out at least a hope of paying all cash, where he does not appear to have had any intention of so doing. Upon his own evidence he made a vital change in the option document, which he had not discussed with the appellant. He suggested and obtained authentication of this change from the sister of the appellant. After failing to get the appellant to agree with him as to a closing date, he endeavoured to get the appellant to agree to that without calling it to his attention, by having it written below his signature on his acceptance of the offer which he was presenting to the appellant. To say the least, his conduct throughout has the appearance of over-reaching such as would cause me to hesitate to grant him equitable relief. I do not, however, base my judgment on this ground as, in the view which I take of the case, it is quite unnecessary.

Counsel for the appellant also presented an argument as to damages, but in the view which I take of the plaintiff's cause of action, it is not necessary to discuss the question of damages.

For the foregoing reasons I would allow the appeal with costs, set aside the judgment of the learned trial judge and direct that the action be dismissed with costs.

*Appeal allowed with costs and action dismissed with costs.*

*Solicitors for the plaintiff, respondent: Thompson, Gregory, Anderson & Ehgoetz, Stratford.*

*Solicitor for the defendant, appellant: J. N. Lindsay, St. Thomas.*



## [COURT OF APPEAL.]

## Phillips and Taylor v. The City of Sault Ste. Marie.

*Taxation—Municipal Real Property Assessment—Crown Lands—Interests of Occupiers—Personal Tax on Crown Employees — Whether Employees Liable to Pay Tax—Constitutional Validity of Legislation—The Assessment Act, R.S.O. 1950, c. 24, ss. 1(o), 30, 32, 98, 99—The Municipal Act, R.S.O. 1950, c. 243, s. 308.*

The effect of the 1950 amendments to what is now s. 32 of The Assessment Act is that a municipality may now not only assess employees of the Government of Canada in respect of Crown lands on which they reside as a condition of their employment, but also levy and collect a tax in respect of that assessment. The amendments have the effect of providing for a personal tax in such circumstances. *Stinson v. The Township of Middleton*; *Wright v. The Township of Middleton*, [1949] O.R. 237, distinguished. The legislation providing for this tax is not invalid as providing for an indirect tax, and it is within s. 92(2) of The British North America Act. Nor can it be held to be invalid as imposing a tax that will not be of general application, since the tax does not differ in essence from other taxes imposed on members of a particular class.

Judgment of GALE J., [1952] O.R. 655, affirmed, HENDERSON J.A. *dissenting*.

AN APPEAL by the plaintiffs and the Attorney General of Canada from the judgment of Gale J., [1952] O.R. 655, [1952] 4 D.L.R. 237, dismissing the action.

1st and 2nd December 1952. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

*C. F. H. Carson, Q.C.* (*W. R. Jackett, Q.C.*, and *Allan Findlay*, with him), for the appellants: In *Stinson v. The Township of Middleton*; *Wright v. The Same*, [1949] O.R. 237, [1949] 2 D.L.R. 328, it was held that if a servant of the Crown was required to occupy Crown lands as a condition of his employment the occupation was that of the Crown, and that the employee was not a tenant and could not be assessed as a tenant. By an amendment, 1950, c. 3, s. 6, to s. 38(1) of The Assessment Act, R.S.O. 1937, c. 272 (now R.S.O. 1950, c. 24, s. 32), the definition of "tenant" was enlarged to include Crown servants who had no interest in Crown property. [LAIDLAW J.A.: I suppose it can be assumed that these amendments were passed to overcome the effect of the *Stinson* case?] Yes. [LAIDLAW J.A.: Then it becomes merely a question whether they have that effect.] Yes.

Section 32(1) in its present form provides for an assessment of a person in respect of Crown property and this, since it applies to "lands or property belonging to Canada" is *ultra vires* by reason of s. 125 of The British North America Act, 1867.

[LAIDLAW J.A.: Would it not be competent for the Legislature to provide for a direct personal tax, using the assessment of land as a basis for that tax?] If it were done in clear and compelling language it might be valid. All taxes are personal taxes, in the sense that they are paid by persons: *Provincial Treasurer of Alberta et al. v. Kerr et al.*, [1933] A.C. 710, [1933] 4 D.L.R. 81, [1933] 3 W.W.R. 38, but the only tax of which I am aware that is imposed directly on persons, not in respect of anything else, is a poll-tax. Even income tax is paid in respect of income. [ROACH J.A.: Cannot the Legislature say that a particular individual or group of individuals shall pay a particular tax?] Provided it is clearly imposed as a direct tax, that can be done. [ROACH J.A.: The next step, then, is surely that the Legislature may determine the quantum of the tax to be imposed by reference to the value of the house in which the taxpayer resides, so long as it is made clear that the tax is not one on land.] That would be valid under *Provincial Treasurer of Alberta et al. v. Kerr et al.*, *supra*, and *Attorney-General of British Columbia v. Esquimalt and Nanaimo Railway Company et al.*, [1950] A.C. 87, [1950] 1 D.L.R. 305, [1949] 2 W.W.R. 1233, 64 C.R.T.C. 165. [HENDERSON J.A.: If there is a tax on land the land pays the tax, not the person.] There is a secondary right to charge the land if the person does not pay. [HENDERSON J.A.: Then the real burden of the tax is on the land.] Yes, if the person does not pay: *Bennett & White (Calgary) Ltd. v. Municipal District of Sugar City No. 5*, [1951] A.C. 786, [1951] C.T.C. 219, [1951] 4 D.L.R. 129, 3 W.W.R. (N.S.) 111.

If the tenant has an interest in the Crown lands, then an assessment made under such a provision must be construed as an assessment of his interest and not of the Crown's interest, since the latter would be a violation of s. 125 of The British North America Act: *The Calgary and Edmonton Land Company v. The Attorney General of Alberta* (1911), 45 S.C.R. 170; *Smith v. Rural Municipality of Vermillion Hills*, [1916] 2 A.C. 569, 30 D.L.R. 83, [1917] 1 W.W.R. 108; *City of Montreal v. Attorney-General for Canada*, [1923] A.C. 136, 70 D.L.R. 248. [LAIDLAW J.A.: If that is so, the 1950 amendment has changed the definition of tenant to include a person who is using Crown land, but has no interest in it. The definition of tenant may

have been enlarged, but the question is whether the Legislature has gone far enough to create a liability for tax, because formerly a municipality could tax only an interest in land.] Yes, and the charging is against the land. [LAIDLAW J.A.: Your submission then is that the Province cannot tax the Crown's interest in land, but may tax the interest of an individual in Crown land, and that merely changing the definition of tenant does not automatically give an individual, even if he comes within the extended definition, an interest in the land?] Yes.

It is clear that before the 1950 amendments the tax could not have applied to the plaintiffs, under the *Stinson* case, *supra*. The present s. 32(1) directs that Crown servants, such as the plaintiffs, who have no interest in the "land owned by the Crown" shall nevertheless be assessed "in respect of the land". This, it is submitted, is provision for assessment of Crown property, and not merely the creation of a new personal tax: *Provincial Treasurer of Alberta et al. v. Kerr et al.*, *supra*; *Bennett & White (Calgary) Ltd. v. Municipal District of Sugar City No. 5*, *supra*.

The identification of the subject-matter of the tax is to be made by the charging section of the statute: *Provincial Treasurer of Alberta et al. v. Kerr et al.*, *supra*. As a result of the 1950 amendments s. 32 now provides by the same operative language both for the assessment of a person who has an interest in Crown lands and for the assessment of Crown servants who have no interest in the land. Both assessments are against a person "in respect of the land". Both purport to be assessments of property. [ROACH J.A.: The assessment may not be illegal; in practice, is not Crown land assessed for information, but not taxed?] [C. R. Magone, Q.C.: By s. 16 of The Assessment Act the assessor is required to assess all lands, including exempt lands.]

If the tax is not a tax on land, but a personal tax on Crown servants who are required to live on Crown property, it is invalid as an indirect tax. Such a tax does not fall within the well-known category of municipal property taxes, which have always been regarded as direct: *City of Halifax v. Estate of J. P. Fairbanks et al.*, [1928] A.C. 117 at 125, [1927] 4 D.L.R. 945, [1927] 3 W.W.R. 493. The Court is not justified in classifying a tax as direct merely because it is in some sense asso-



ciated with the occupation of property: *Atlantic Smoke Shops Limited v. Conlon et al.*, [1943] A.C. 550 at 565, [1943] 2 All E.R. 393, [1943] 4 D.L.R. 81, [1943] 3 W.W.R. 113. As to what is direct and indirect taxation, I refer to *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575.

In considering what is the "expectation and intention" of the taxing authority reliance must be placed on the principle laid down by Duff J. in *The Security Export Company v. Hetherington*, [1923] S.C.R. 539 at 559, [1923] 3 D.L.R. 519. [LAIDLAW J.A.: There is no evidence of any intention that this tax should be passed on.] All cases under s. 92 of The British North America Act say that it is not necessary to prove that it was in fact passed on; one need only show what would generally be expected: *Atlantic Smoke Shops Limited v. Conlon et al.*, *supra*; *Attorney-General for Manitoba v. Attorney-General for Canada et al.*, [1925] A.C. 561, [1925] 2 D.L.R. 691, [1925] 2 W.W.R. 60. The tax here in question is not one that "is demanded from the very persons who are ultimately to bear the burden of it", and it is therefore an indirect tax.

Further, a special personal tax imposed only on federal Crown servants who are required to live on Crown lands is *ultra vires* since it is not in pith and substance related to "Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes", within s. 92(2) of The British North America Act. The tax could be justified only if it were of general application: *Abbott v. The City of Saint John* (1908), 40 S.C.R. 597; *Caron v. The King*, [1924] A.C. 999, [1924] 4 D.L.R. 105, [1924] 3 W.W.R. 417; *Forbes v. Attorney-General for Manitoba*, [1937] A.C. 260, [1937] 1 All E.R. 249, [1937] 1 D.L.R. 289, [1937] 1 W.W.R. 167.

This matter is not *res judicata*. Neither a court of revision nor a County Court Judge acting under the appeal provisions of The Assessment Act has jurisdiction to determine questions of liability to assessment. Only the superior Courts have jurisdiction to deal with such a question: *Quance v. Thomas A. Ivey & Sons, Limited*, [1950] O.R. 397, [1950] 3 D.L.R. 656; *The Town of Brampton v. Hutchinson et al.*, [1950] O.R. 491; *Bennett & White (Calgary) Ltd. v. Municipal District of Sugar City No. 5*, *supra*.

*W. G. H. Bennett*, for the defendant, respondent: The issue raised in this action is *res judicata* by reason of the decision of the

District Court Judge on the appeal to him. There was a trial *de novo* by the judge, who exercised judicial functions, and no appeal was taken from his decision. The *ratio decidendi* in *Quance v. Thomas A. Ivey & Sons, Limited*, [1950] O.R. 397, [1950] 3 D.L.R. 656, supports this contention, as does *Village of Hagersville v. Hambleton*, 61 O.L.R. 327, [1927] 4 D.L.R. 1044. I submit that *The Town of Brampton v. Hutchinson et al.*, [1950] O.R. 491, was wrongly decided, and should not be followed. The plaintiffs elected to go to the District Court Judge for their remedy, and cannot now come to this Court. I refer also to *Re Gordon and The De Laval Company Ltd.*, [1938] O.R. 462, [1938] 3 D.L.R. 263.

The assessment provided for by s. 32(1) of The Assessment Act results in a personal tax when a levy is made under s. 308(1) of The Municipal Act. It is competent for the Legislature of Ontario to impose a personal tax on occupants of Crown lands, whether or not they have an interest in the lands: *Stinson v. The Township of Middleton*; *Wright v. The Same*, [1949] O.R. 237, [1949] 2 D.L.R. 328. Such legislation is not objectionable merely because it imposes a special tax on some servants of the Crown: *Forbes v. Attorney-General for Manitoba*, [1937] A.C. 260, [1937] 1 All E.R. 249, [1937] 1 D.L.R. 289, [1937] 1 W.W.R. 167. The provisions of s. 32(1) in its present form effectively implement a social policy designed to distribute the cost of municipal services among all persons enjoying the benefit of those services. This factor should weigh in favour of the validity of the legislation.

I rely on the reasons of the learned trial judge.

[ROACH J.A.:—What is the effect of a provision that a person who occupies land in which he has no interest is to be assessed “in respect of the land”?] The taxation of these plaintiffs is based upon the value of the land. The subject of the assessment is a person, not the land. The value of land belonging to the Crown may be taken as the measure of the tax to be imposed upon a person in respect of that land: *Smith v. The Rural Municipality of Vermillion Hills*, [1916] 2 A.C. 569, 30 D.L.R. 83, [1917] 1 W.W.R. 108. The “interest” of the occupant of Crown lands consists in the benefits of the occupation to him during the period of his occupancy and does not depend upon the length of his tenure: *City of Montreal v. Attorney-General for Canada*,

[1923] A.C. 136 at 142, 70 D.L.R. 248. It is not essential to the carrying out of the plaintiffs' duties that they should reside in the very houses they occupy; they could just as easily perform those duties if they lived in a house owned by a person other than the Crown in the area of the canal. As authority for the validity of the imposition of taxes on a servant of the Crown occupying Crown lands in such circumstances I refer to *In re The Town Act, 1947*; *Watters v. Town of Watrous*, [1950] 1 W.W.R. 711, [1950] 2 D.L.R. 574.

C. R. Magone, Q.C. (D. M. Treadgold, Q.C., with him), for the Attorney-General for Ontario: This legislation is not aimed primarily at federal Crown servants, but includes all Crown servants, whether federal or provincial.

The learned trial judge was right in holding: (1) that s. 32 of The Assessment Act provides for the personal assessment of the plaintiffs and imposes upon them a personal liability to pay the taxes levied against them; (2) that the tax is not a tax on property belonging to the Crown; and (3) that the Legislature has power to impose such a tax.

In construing a statute regard should be had to its legislative history: *Attorney-General for Ontario v. Perry*, [1934] A.C. 477 at 485, [1934] 4 D.L.R. 65, [1934] 3 W.W.R. 35. The power of a provincial Legislature to impose taxes on servants of the federal Government is well established: *Abbott v. The City of Saint John* (1908), 40 S.C.R. 597; *Forbes v. Attorney-General for Manitoba*, [1937] A.C. 260, [1937] 1 All E.R. 249, [1937] 1 D.L.R. 289, [1937] 1 W.W.R. 167; *Re Town of Cochrane and Cowan* (1921), 50 O.L.R. 169, 64 D.L.R. 209. The Legislature, for the purpose of fixing the tax to be paid by an individual, may relate it to the value of land that is itself exempt from taxation: *Bennett & White (Calgary) Ltd. v. Municipal District of Sugar City No. 5*, [1951] A.C. 786, [1951] C.T.C. 219, [1951] 4 D.L.R. 129, 3 W.W.R. (N.S.) 111. Succession duties are a tax based in some cases on the value of property that the Province could not otherwise tax, e.g., property outside the Province, but included for valuation purposes. A squatter has no interest in the property, but he is an occupant and therefore taxable: *Rural Municipality of Spy Hill v. Bradshaw* (1912), 2 W.W.R. 399, 7 D.L.R. 941.



C. F. H. Carson, Q.C., in reply, referred to *Canadian Pacific Railway Company v. Attorney General for Saskatchewan*, [1951] S.C.R. 190, [1951] C.T.C. 26, [1951] 1 D.L.R. 721.

*Cur. adv. vult.*

30th January 1953. HENDERSON J.A. (*dissenting*):—I have had the privilege of reading the opinion of my brother Laidlaw, which contains a full and accurate statement of the matters in issue. I agree with the opinion of my brother Laidlaw that the plaintiffs have the right to maintain this action. It concerns certain amendments made by the Legislature of the Province of Ontario to The Assessment Act, now R.S.O. 1950, c. 24. The avowed object of the amendments is to enable municipalities to place upon their assessors' rolls, and in due course upon their collectors' rolls, the names of certain servants of the Crown in right of the Dominion of Canada in respect of property of the Crown occupied by those servants as a term of their contract of employment and for the performance of their duties. I can think of no way in which these servants of the Crown can be put upon the assessor's roll and the collector's roll except in respect of the real property of the Crown which they occupy, and I assume that the assessment and tax is based upon the value of that occupation. In my opinion this is a breach of the right of the Crown in right of the Dominion of Canada to exemption of its real property in the Province, with the result that the legislation is *ultra vires*. In my opinion the relationship of landlord and tenant does not exist between the Crown and the plaintiffs Phillips and Taylor, and I also am of the opinion that it is not within the jurisdiction of the provincial Legislature to create that relationship. The plaintiffs have no interest in the property and their right of occupation of it is a term of their employment and exists only while that employment continues. Mr. Carson upon the hearing of the appeal presented several arguments, among them the following:

That if the assessments made and taxes levied are personal assessments and personal taxes the provisions of the Act are *ultra vires* as being a law levying an indirect tax. The presence of the Attorney-General of Canada as an appellant is, I think, cogent evidence that that is the view of the Crown in right of Canada and recognizes the right of the appellants Phillips and Taylor to pass the levy on to the Crown as their employer.

Further, Mr. Carson argued that the tax in pith and substance is not in relation to any of the classes of subjects assigned exclusively to the Legislatures of the Provinces by s. 92 of The British North America Act; that the tax is a new and unfamiliar tax and that the Court should consider its real nature and effect in order to determine into which of the two categories, direct or indirect, it falls.

Mr. Carson also argued that the tax in question is not a tax of general application.

These contentions seem to me to be sound. It is quite evident that the tax is imposed only on employees of the Crown in right of Canada who are required to live on property of the Crown in the course of their employment. I am not able, of course, to say what percentage of the servants of the Crown in right of Canada come within the legislation but it is quite apparent to me that it is a very small percentage of the whole.

I do not discuss the application of the legislation to employees of the Crown in right of the Province. That does not arise here. Doubtless the legislation does apply in these terms to certain employees of the Province, who would be a very small percentage of the whole, but that question does not arise in this case.

In the result in my view the appeal should be allowed and the relief claimed by the appellants should be granted with costs of the appeal and in the Court below.

LAIDLAW J.A.:—This is an appeal by the plaintiff and the Attorney-General of Canada from a judgment delivered by Gale J. on the 26th June 1952, dismissing an action in which the plaintiffs claimed, *inter alia*,

“(a) a Declaration that the assessments made by the Defendant against the Plaintiffs in respect of the said lands occupied by them are invalid and of no legal force or effect.

“(b) an Order striking the said assessments made against the Plaintiffs by the Defendant from the Defendant’s Assessment Rolls.

“(c) an injunction restraining the Defendant from levying or taking any steps or proceedings whatever to collect any taxes levied against the Plaintiffs as aforesaid.”

The Court ordered that the action be dismissed and declared “that the respective assessments made by the defendant for the year 1950 with respect to each of the plaintiffs are valid and

binding upon them". The Court also ordered that the defendant recover a certain sum from each of the plaintiffs.

Prior to the trial the parties agreed upon a statement of facts which was filed at trial as ex. 1. That statement was supplemented by evidence given at the trial by way of cross-examination of the plaintiff Phillips.

The facts, as set forth in an agreed statement of facts, are quoted in the reasons for judgment of the Court below and I reproduce them now for convenience:

"1. The Plaintiff G. Neil Phillips is employed by His Majesty the King in right of Canada as a Superintending Canal Engineer, Grade 1, of the Ship Canal, at the City of Sault Ste Marie.

"2. The Plaintiff James Taylor is employed by His Majesty the King in right of Canada as a Mechanical Superintendent of the Ship Canal. He is classified as a Technician Grade 5, and acts as the Plaintiff G. Neil Phillips' assistant.

"3. In the course of their employment as servants of His Majesty the King in right of Canada each plaintiff is required as a term of his employment to reside in a house and premises owned by His Majesty the King in right of Canada and situate on St. Mary's Island in the said City of Sault Ste. Marie, in order to more effectively carry on his duties as a servant of His Majesty at any time of day or night.

"4. The Plaintiff G. Neil Phillips occupies a large stone residence on the canal grounds known as No. 1 Residence. This house consists of 9 rooms and is surrounded by very beautiful landscaped and spacious grounds.

"5. The Plaintiff James Taylor occupies a two storey six room frame dwelling situate on the Easterly end of the Ship Canal grounds.

"6. The furniture, furnishings and contents in the said respective dwellings are owned by the occupant thereof.

"7. No charge is made by His Majesty The King to the Plaintiffs or either of them for the use of their respective dwellings except that deductions are made from their respective salaries for such use. These deductions bear no relation to the rentable value of the dwellings. In the case of the plaintiff G. Neil Phillips the deduction aforesaid from salary was the sum of \$44.40 per month or \$532.80 per year prior to December 12th 1950, and since that date the sum of \$48.96 per month or \$587.52 per year. In the case of the plaintiff James Taylor the



deduction from salary is the sum of \$96.00 a year. This occupation charge in both cases includes heat, water, light, telephone and repairs made or supplied by His Majesty. The plaintiffs have a right to occupy the said premises only while employed as aforesaid and their right to occupy ceases with their employment. While in occupation of their respective dwellings the plaintiffs are accorded by the Municipality the same rights and privileges as tenants including school privileges and municipal services and utilities.

"8. The premises referred to in paragraphs numbered 4 and 5 hereof are the premises in which the Plaintiffs are respectively required to reside as stated in paragraph numbered 3 hereof and referred to in paragraph numbered 6 hereof. The lands were at all material times owned by His Majesty the King in right of Canada and no person other than His Majesty the King in right of Canada had any right, title or interest therein unless and to the extent that it may be said that the user of the said lands by the Plaintiffs as herein set forth constitutes some right, title or interest in the lands which the Defendant contends and which the Plaintiffs deny. His Majesty the King has made no grant of a lease or other interest in any of the said lands in favour of the Plaintiffs or either of them.

"9. The Defendant's Assessment Commissioner assessed the Plaintiff G. Neil Phillips in the year 1950 under the Provisions of the Assessment Act (Ontario) on the basis of a tenancy of the house and premises in the sum of \$3,000.00 and on the said assessment a tax levy of \$187.50 was made by the Defendant in 1951 against the Plaintiff for the 1951 tax.

"10. The Defendant's Assessment Commissioner assessed the Plaintiff James Taylor in the year 1950 under the provisions of the Assessment Act (Ontario) on the basis of a tenancy of the house and premises in the sum of \$1,600.00 and on the said assessment a tax levy of \$100.00 was made by the Defendant in 1951 against the said Plaintiff for the 1951 tax.

"11. The taxes hereinbefore referred to are unpaid.

"12. The facts stated in paragraphs 5, 6, 7 and 8 of the Statement of Defence are admitted.

"13. No question arises as to the procedure adopted for the assessment and levy or as to the amount of the assessment. The only question involved in this action is whether the Defendant

is entitled to assess and levy taxes against the Plaintiffs in respect of the property so occupied by them."

Paragraphs 5, 6, 7 and 8 of the statement of defence, referred to in para. 12 of the above "Statement of Facts Admitted", are as follows:

"5. Each of the said Plaintiffs appealed to the Court of Revision of the City of Sault Ste. Marie, under the provisions of the said Assessment Act, against the said respective assessments made in 1950 upon the sole ground that the Plaintiffs were not assessable in respect of their use of the said lands as a residence, and the said assessments were confirmed by the said Court of Revision, and each Defendant thereupon appealed against the decision of the Court of Revision to His Honour, the Judge of District Court of the District of Algoma, upon the same ground.

"6. The said appeal was heard by the Judge of the said District Court, as a hearing de novo and on viva voce evidence and both of the said assessments were confirmed in a written decision of His Honour, the said Judge, and said decision was duly entered upon the Assessment Roll as required by the said Assessment Act.

"7. At the time of giving his decision, His Honour was requested by Counsel for both Plaintiffs to note certain questions of law, and to state them in the form of a special case for the Court of Appeal of Ontario.

"8. Before His Honour had complied with said request for a stated case, the Plaintiffs each through Counsel filed and served a written withdrawal of each of their requests for a stated case, and same was not proceeded with and Counsel withdrew all exhibits filed by each plaintiff."

There is little, if anything, of importance in the evidence given at the trial by the plaintiff Phillips. He said, in part, that when he considered whether he wanted to continue in his employment one of the factors he took into consideration was that the amount of money paid by him for use of the property owned by Her Majesty the Queen in right of Canada and used by him for residential purposes was a little lower than "the general rental for the same kind of house in the city of Sault Ste. Marie"; that when his employment terminated he was obliged to give up the house immediately; that there was no written agreement whatever with his employer that required notice to be given to

him of the termination of his employment; that he could carry on his duties in much the same way if he lived in a house privately owned and no further away from the canal than his present house.

Apart from the question of *res judicata*, there is only one question for determination by this Court, namely, are the plaintiffs subject to assessment and liable for taxes under the provisions of The Assessment Act as amended in 1950?

The question of *res judicata* involves the question of the jurisdiction of the Court, and I shall therefore deal with that matter at once. It was argued by counsel for the respondent that the decision of the judge of the District Court of the District of Algoma in favour of the assessment was final and conclusive and that the plaintiffs had no right to submit their rights for adjudication by the Supreme Court of Ontario. It was urged that the judgment of this Court in *The Town of Brampton v. Hutchinson et al.*, [1950] O.R. 491, was given in error and should not be followed. In the reasons for judgment in that case reference was made by me to *Village of Hagersville v. Hambleton*, 61 O.L.R. 327 at 330, [1927] 4 D.L.R. 1044. That reference was intended to direct attention only to the statement made by that learned jurist Middleton J.A. in support of my view that "the learned County Judge, exercising the statutory jurisdiction of appeal from the court of revision, had no greater jurisdiction than the court of revision." Likewise, my reference to *Re Gordon and The DeLaval Company Ltd.*, [1938] O.R. 462 at 468, [1938] 3 D.L.R. 263, was for the same purpose. It will be observed that in *Village of Hagersville v. Hambleton*, *supra*, it was admitted that jurisdiction was legally and effectively vested in the court of revision, and it will be observed also that the judgment of the Court in that case is not in accord with later cases in Ontario; see *Sifton v. City of Toronto*, 63 O.L.R. 397, [1929] 1 D.L.R. 933, reversed [1929] S.C.R. 484, [1929] 3 D.L.R. 852; and *City of Ottawa v. Wilson*, [1933] O.R. 21, [1933] 1 D.L.R. 273, referred to by counsel in *Quance v. Thomas A. Ivey & Sons, Limited*, [1950] O.R. 397 at 398, [1950] 3 D.L.R. 656. Finally, *Village of Hagersville v. Hambleton* was disapproved in *Bennett & White (Calgary) Ltd. v. Municipal District of Sugar City No. 5*, [1951] A.C. 786 at 807-8, [1951] C.T.C.



219, [1951] 4 D.L.R. 129, 3 W.W.R. (N.S.) 111. In that case the effect of the authorities is stated as follows:

“ . . . that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the taxpayer of that right.”

I apply that principle to the instant case and conclude that the plaintiffs had a right to submit to the Supreme Court of Ontario the question whether they were liable to assessment and taxation. The argument that that question is *res judicata* therefore fails.

I proceed then to consider whether, upon the proper construction of the provisions of The Assessment Act as amended, the plaintiffs are liable (1) to assessment and (2) to taxation.

In *Stinson v. The Township of Middleton*; *Wright v. The Township of Middleton*, [1949] O.R. 237, [1949] 2 D.L.R. 328, it was decided by this Court that (I quote the headnote in the Ontario Reports): “Where employees of the Dominion Government are required, for the performance of their duties, to live on Crown lands, deductions being made from their salaries for the use of their respective houses, but the amount of the deduction being based upon the amount of salary rather than upon a rentable value of the house in each case, they are not ‘tenants’ of their houses, within the meaning of s. 1(o) of The Assessment Act, and are accordingly not assessable under s. 38(1), as amended.”

It was decided also, per Laidlaw and Roach JJ.A., that: “The tax authorized by s. 38(1) of The Assessment Act is a tax on land, and the section must accordingly be construed as authorizing an assessment of Crown lands only where the ‘tenant’ of such lands has an interest therein.”

Section 38(1), as re-enacted by 1946, c. 3, s. 6, and amended by 1947, c. 3, s. 16, considered in that case, read as follows: “Notwithstanding paragraph 1 of section 4, the tenant of land owned by the Crown where rent or any valuable consideration is paid in respect of such land and the owner of land in which the Crown has an interest and the tenant of such land where rent

or any valuable consideration is paid in respect of such land shall be assessed in respect of the land in the same way as if the land was owned or the interest of the Crown was held by any other person."

Section 38(3) read: "In addition to the liability of every person assessed under subsection 1 . . . to pay the taxes assessed against the land, the interest in such land, if any, of every person other than the Crown . . . shall be subject to the lien given by section 99 and shall be liable to be sold or vested in the municipality for arrears of taxes."

In 1950 amendments were made to subss. 1 and 3 of s. 38 by 14 Geo. VI, c. 3, s. 6. The following clause was added to subs. 1:

"(a) For the purposes of this subsection,

"(i) 'tenant', in addition to its meaning under clause o of section 1, shall also include any person who uses land belonging to the Crown as or for the purposes of, or in connection with his residence, irrespective of the relationship between him and the Crown with respect to such use,

"(ii) 'residence' shall mean a building or part of a building used as a domestic establishment and consisting of two or more rooms in which persons usually sleep and prepare and serve meals.

"(iii) 'rent or any valuable consideration' shall be deemed to have been paid, in the case of an employee using land belonging to the Crown as a residence, where there is a reduction in or deduction from the salary, wages, allowances or emoluments of the employee because of such use or where such use is taken into consideration in determining the employee's salary, wages, allowances or emoluments."

Subsection 3 was amended by striking out the words "the land" in the third line and inserting in lieu thereof the word "him" so that the subsection as amended read as follows: "In addition to the liability of every person assessed under subsection 1 . . . to pay the taxes assessed against him, the interest on such land, if any, of every person other than the Crown . . . shall be subject to the lien given by section 99 and shall be liable to be sold or vested in the municipality for arrears of taxes."

It is frankly conceded by counsel for the appellants, and there can be no doubt about it, that these amendments to s. 38 were

made for the purpose of overcoming the judgment in the *Stinson* case, *supra*. The object of the amending legislation was plainly to make the tenant in person liable to assessment and taxation, whereas before the amendment the subject of that liability was the interest of the tenant in the lands.

There is no doubt whatever that the plaintiffs fall within the scope of the definition of "tenant" as set forth in the amendment of subs. 1 quoted above. There was no suggestion to the contrary in the argument. The real question in controversy is whether or not the change in subs. 3, by inserting the word "him" in lieu of the words "the land", has changed the subject of liability from "the land" owned by the Crown to "the tenant" in respect of that land. After much consideration and study, I have reached the conclusion that the amendment to subs. 3 has that effect.

In the *Stinson* case I stated at p. 253 that it was unnecessary to consider and determine the question whether the assessment was an assessment against the appellant personally or an assessment against the lands, but, because of the argument and the question then submitted to the Court for determination, I expressed the view that upon a proper consideration of s. 38(1) of The Assessment Act, having regard to other provisions therein, the tax was a tax on land and that the land was exempted from taxation by virtue of s. 125 of The British North America Act. I said that opinion appeared to me to be made plain by the language of s. 38(3) as re-enacted by 1946, c. 3, s. 6, which expressly referred to the liability "to pay the tax assessed against [such] land." Roach J.A. made it abundantly plain that the taxation contemplated by s. 38(1) was a tax on land because subs. 3 of s. 38, as re-enacted by 1946, c. 3, s. 6, said so.

The decision in the *Stinson* case that "what the Legislature intended by subs. 1 was an assessment on which a tax *in rem* would be levied in contrast to a tax *in personam*" (per Roach J.A. at p. 255) depended wholly upon the use of the words "assessed against the land" in subs. 3 of s. 38. When these words were changed to "assessed against him" (*i.e.*, the tenant) it also changed the effect and construction of subs. 1. I am satisfied that in making the change the Legislature intended that the subject of assessment and taxation contemplated by subs. 1 should be the tenant of Crown lands and not the lands used by



the tenant. That is the construction I now give to subs. 1 of s. 38.

There is no express provision in The Assessment Act that the tenant is to be liable to any extent in respect of Crown property. Nevertheless I think that liability of the tenant can properly be implied from relevant provisions of the Act. It is my opinion that the words "the tenant . . . shall be assessed" as used in s. 38(1) mean that "the tenant shall be assessed and taxed" in respect of land owned by the Crown. Thus the subsection contemplates a liability to assessment and also a liability to taxation. That view is in accordance with subs. 3, in which it is provided that "In addition to the liability of every person assessed under subsection 1 . . . to pay the taxes assessed against him", the tenant's interest in the land, if any, shall be subject to a lien and may be sold. Subsection 3 undoubtedly assumes that a liability to taxation has been imposed on the tenant even though the liability is not imposed by the use of express language. That view is also in accordance with the provisions in s. 100 (presently R.S.O. 1950, c. 24, s. 99) that "The taxes payable by any person may be recovered with interest and costs as a debt due the municipality". I also refer to ss. 2 and 3 of The Assessment Act and s. 308(1) of The Municipal Act, R.S.O. 1950, c. 243.

It remains only to discuss briefly certain points advanced in argument by counsel for the appellant. It was urged that if the assessments made under s. 38(1) as amended are "personal assessments" and such taxes are "personal taxes" the provisions of the Act directing such assessment and levying such taxes, in so far as they purport to apply to federal Crown servants, are *ultra vires*, (a) as being a law levying an indirect tax, and (b) as being a law which in pith and substance is not in relation to any of the classes of subjects assigned exclusively to the Legislatures of the Provinces by s. 92 of The British North America Act. It was argued that the tax is "a new and unfamiliar tax" and that "accordingly the Court should consider its real nature and effect in order to determine into which of the two categories of taxes, direct or indirect, it falls"; and that the "normal effect and tendency" of the tax in question will be for it to be passed from the Crown's servant, from whom it is demanded, to the Crown; and that the tax in question is not one which "is demanded from the very persons who are ultimately to bear the

burden of it". Counsel relied upon *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575 at 582, and *The Security Export Company v. Hetherington*, [1923] S.C.R. 539 at 559, [1923] 3 D.L.R. 519. These cases and many others are discussed in *Canadian Pacific Railway Company et al. v. The Attorney-General for Saskatchewan et al.*, [1952] 2 S.C.R. 231, [1952] 4 D.L.R. 11, 69 C.R.T.C. 1. I am not willing to say that in the existing circumstances the tax is one that is demanded from the tenant in the expectation and with the intention that he will indemnify himself at the expense of the Crown. I cannot say that the normal effect and tendency of the tax is to place the burden of it on the Crown. On the contrary, I think the only conclusion I can properly reach in the circumstances is that the Legislature intended that the tax should be paid by the tenant against whom the levy and demand were made. The tax was not indirect but in my opinion was direct taxation. Also, the legislation in question is a law which, in pith and substance, is in relation to "Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes", so as to come within s. 92(2) of The British North America Act.

Counsel for the appellant argued that "the tax in question is not a tax of general application"; it was urged that "the tax is imposed only on employees of the Crown who are required to live on property of the Crown in the course of their employment"; that "it is not imposed on other employees who are required to live on the property of their employers in the course of their employment"; and that "in other words, it is not a tax which applies generally to employees who use property in the course of their employment but have no interest in such property". I think that argument fails. The liability to assessment and taxation contemplated by s. 38(1) as amended is imposed on every person who falls within the scope of the section. It is quite true that the section does not extend to every employee who is required to use property of his employer in the course of his employment, but that fact does not make the legislation invalid. It does not differ in character from other provisions which impose liability to assessment and taxation on persons of a described class. For instance, every person occupying or using land for the purpose of or in connection with any business mentioned or described in s. 6 of the Act is assessable. Likewise, every telephone company of a described class is assessable

under s. 7 of the Act. So too, in my opinion, every servant of the Crown in right of Canada or in right of a Province who falls within the scope of s. 38(1) as amended is liable to assessment and taxation. I have read and now refer to *Abbott v. The City of St. John* (1908), 40 S.C.R. 597; *Caron v. The King*, [1924] A.C. 999, [1924] 4 D.L.R. 105, [1924] 3 W.W.R. 417; *Forbes v. Attorney General for Manitoba*, [1937] A.C. 260, [1937] 1 All E.R. 249, [1937] 1 D.L.R. 289, [1937] 1 W.W.R. 167.

Before parting from this case, I desire to direct attention to certain views expressed by Lord Reid in *Bennett & White (Calgary) Ltd. v. Municipal District of Sugar City No. 5*, [1951] A.C. 786, [1951] C.T.C. 219, [1951] 4 D.L.R. 129, 3 W.W.R. (N.S.) 111, which I think give support to my opinion. Lord Reid said at p. 818: "In cases, at least where *land* has been concerned, it has been held that if the language of the provincial statute is sufficiently explicit and compelling, A may be taxed in respect of property 'belonging' to B. Even where B is exempt, e.g., where B is the Crown, property belonging to B may be taken as a fictional measure of the tax to be exigible from A, provided always that the Act makes this intention perfectly clear."

Finally I should like to say that I have studied with much care the reasons for judgment given by Gale J. in the Court below. I can find no error whatever in them and, indeed, they are so complete and my views are in such full accord with them that in the reasons I have now prepared I have added little, if anything, to them.

My conclusion is that this appeal should be dismissed with costs.

ROACH J.A. agrees with LAIDLAW J.A.

*Appeal dismissed with costs, HENDERSON J.A.  
dissenting.*

*Solicitors for the appellants: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.*

*Solicitors for the defendant, respondent: Hamilton, Carmichael & Bennett, Sault Ste. Marie.*



## [COURT OF APPEAL.]

## Regina v. Willaert.

*Criminal Law — Punishment — Matters to be Considered — Threefold Aspect of Punishment — Importance of Element of Reformation — Special Circumstances in Prisoner's Antecedents — Powers and Duties of Court of Appeal on Appeal from Sentence — The Criminal Code, R.S.C. 1927, c. 36, ss. 1013(2) (as re-enacted by 1933, c. 44, s. 48), 1015.*

Judicial punishment for crimes has a threefold aspect—the deterrent, the reformatory and the retributive, of which the idea of reformation is the most hopeful, and that to which the efforts of those concerned with criminal justice will be more and more directed, except in those cases where it is clear that there is no hope of reforming the offender. The true function of punishment should be a wise blending of the deterrent and the reformatory, with retribution not entirely disregarded, and with a constant appreciation that the matter concerns society as a whole, and not only the Court and the offender. Consequently, no hard-and-fast or permanent rules can be laid down as to the exercise of the Court's discretion in respect of punishment. *Rex v. Rotherham Licensing JJ.; Ex parte Chapman*, [1939] 2 All E.R. 710, quoted and applied. Many matters must be considered, and a sentence should be imposed that will best meet all the circumstances. The tendency in recent years has been towards greater moderation in sentences. *Rex v. Duerden* (1942), 28 Cr. App. R. 128; *Rex v. Fox* (1925), 28 O.W.N. 154, quoted and applied.

It is clear from the wording of s. 1015 of The Criminal Code that while a Court of Appeal must examine the case with great care before altering a sentence imposed by a trial judge, it has nevertheless been given wide powers, and should modify the sentence if in its opinion modification is required. *Rex v. Finlay* (1924), 19 Sask. L.R. 43 at 46, quoted and applied.

AN APPLICATION for leave to appeal, and an appeal, from sentence.

9th and 10th February 1953. The appeal was heard by PICKUP C.J.O. and J. K. MACKAY and F. G. MACKAY JJ.A.

*W. A. Donohue*, for the accused, appellant: The trial judge clearly thought this accused should be put away for the protection of society, and acted on that basis. There was no evidence whatever that this accused was a dangerous type, or had abnormal propensities of this kind. If he had been, proceedings could and should have been taken against him as a criminal sexual psychopath, under s. 1054A of The Criminal Code, R.S.C. 1927, c. 36, enacted by 1947-48, c. 39, s. 43, and amended by 1950, c. 11, s. 19. The sentence is excessive, and the trial judge applied the wrong principle: *Rex v. Duerden* (1942), 28 Cr. App. R. 128; *Rex v. Kirk* (1942), 28 Cr. App. R. 129.

The trial judge should have taken into consideration, as mitigating circumstances, the appellant's dreadful experiences

in Belgium during the war, as described in the evidence of the witness Lannoo, and the previous good character of the appellant.

*W. B. Common, Q.C.*, for the Attorney-General, respondent: The appellant must establish a grave error in principle before this Court will interfere with sentence.

I concede that there was no sadistic feature in this case.

The history of the punishment for rape is reviewed in *Rex v. McCathern*, 60 O.L.R. 334, 48 C.C.C. 54, [1927] 2 D.L.R. 1142, where, although there were extenuating circumstances very like those alleged in this case, the Court, in substitution for the death penalty imposed by the trial judge, imposed a sentence of 20 years and 20 lashes.

If there is to be any reduction in this sentence, there should still be a long term of imprisonment, and I ask the Court to consider also the imposition of corporal punishment. [PICKUP C.J.O.: Should corporal punishment be imposed with a long term of imprisonment?] I do not quarrel with the principle laid down by this Court, since the *McCathern* case, *supra*, that as a general rule it should not, but the circumstances of this case are wholly exceptional.

*W. A. Donohue*, in reply.

*Cur. adv. vult.*

3rd March 1953. The judgment of the Court was delivered by

J. K. MACKAY J.A.:—An application for leave to appeal against a sentence imposed for rape.

The appellant was tried at Sarnia on 16th, 17th, 18th, 19th and 22nd September 1952, before Mr. Justice Barlow and a jury, on an indictment charging that he on 2nd May 1952 committed rape on one Shirley Post, and was found guilty. The learned trial judge sentenced the appellant to imprisonment for life. This application is taken for leave to appeal against the length of sentence.

By s. 299 of The Criminal Code, R.S.C. 1927, c. 36, a person guilty of rape may be sentenced to "suffer death or to imprisonment for life, and to be whipped".

By s. 1013(2) of The Criminal Code, as re-enacted by 1938, c. 44, s. 48, a right is given to a person convicted on indictment to appeal against sentence with leave of the Court of Appeal. By s. 1015 it is provided that:

"On an appeal against sentence, unless the sentence is one fixed by law, the court of appeal shall consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive, . . .

"(b) diminish or increase the punishment imposed by that sentence, but always so that the diminution or increase be within the limits of the punishment prescribed by law for the offence of which the offender has been convicted;"

It is therefore clear that while a Court of Appeal must examine an appeal for increase or diminution of sentence with great care before altering a sentence imposed by a trial judge, the Court of Appeal has been given wide powers by s. 1015. Martin J.A. (now C.J.S.), in delivering the judgment of the Court in *Rex v. Finlay*, 19 Sask. L.R. 43 at 46, 43 C.C.C. 62, [1924] 3 W.W.R. 427, [1924] 4 D.L.R. 829, said: "Parliament, by enacting that an appeal may be taken by an accused person against the sentence imposed upon him, must have intended that the accused was entitled to have the opinion of the Court of Appeal after a consideration of all the circumstances connected with the case; it must have intended that the Court of Appeal should modify such sentence, if, in their opinion, it should be modified. The Court of Appeal can only exercise its judgment after a careful consideration of all the circumstances, and will always remember that the trial Judge, having seen the accused and heard the witnesses, has an advantage in reaching a conclusion as compared with a Court which has not—a circumstance which cannot be lightly regarded."

A useful statement of the policy of the law as administered in England is set forth in Halsbury's Laws of England, 2nd ed., vol. 9 (1933), para. 362, pp. 254-5: "The policy of the law is, as regards most crimes, to fix a maximum penalty, which is intended only for the worst cases, and to leave to the discretion of the judge to determine to what extent in a particular case the punishment awarded should approach to or recede from the maximum limit. The exercise of this discretion is a matter of prudence and not of law . . . "

On the afternoon of 1st May 1952, at about 4.45, the complainant, Shirley Post, at that time eight years of age, was returning from school to her home together with two other children, Barbara and Cliff Condle, when they signalled a motor



car which was proceeding in the same direction to stop. This car was driven by the appellant. The three children got into the car and were driven to their respective homes.

The next day, 2nd May, at or near 4.15 in the afternoon, the complainant, Shirley Post, was returning home from school riding on the handlebars of her brother's bicycle when they met a motor car driven by the appellant, going in the direction opposite to that in which the children were returning home. The appellant stopped his car and asked Shirley Post if she wanted a ride. After being urged by her brother she, Shirley Post, got into the car, which was driven in a westerly direction toward the school and away from the home of Shirley Post. After driving some short distance, the car turned in on a side-road where there were bushes. The car stopped. The appellant and the complainant got out of the car and the appellant committed the rape for which he was convicted.

There is little in the record itself to mitigate the gravity of the crime; nevertheless, in measuring sentence, every circumstance should be taken into consideration, and in the exercise of judicial discretion regard should be had to: the age of the prisoner; his past and present condition of life; the nature of the crime; whether the prisoner previously had a good character; whether it is a first offence; whether he has a family dependent upon him; the temptation; whether the crime was deliberate or committed on momentary impulse; the penalty provided by the Code or statute; whether the offence is one for which under the Code the offender is liable to corporal punishment and, if so, whether corporal punishment should be imposed.

I am respectfully of opinion that there are three principles of criminal justice requiring earnest consideration in the determination of punishment, *viz.*, deterrence, reformation and retribution.

The governing principle of deterrence is, within reason and common sense, that the emotion of fear should be brought into play so that the offender may be made afraid to offend again and also so that others who may have contemplated offending will be restrained by the same controlling emotion. Society must be reasonably assured that the punishment meted out to one will not actually encourage others, and when some form of crime has become widespread the element of deterrence must

look more to the restraining of others than to the actual offender before the Court.

Reformation is the most hopeful element in the question of punishment in most cases, and it is in that direction that the efforts of those concerned with criminal justice will be more and more directed. But reformation, too, has its distinct limitations. It has been found in England that many who have passed through all the stages of binding over to keep the peace, probation, approved school, Borstal institution, and prison, have yet become habitual criminals. They appear to be beyond all human reformatory agencies.

The underlying and governing idea in the desire for retribution is in no way an eye for an eye or a tooth for a tooth, but rather that the community is anxious to express its repudiation of the crime committed and to establish and assert the welfare of the community against evil in its midst. Thus, the infliction of punishment becomes a source of security to all and "is elevated to the first rank of benefits, when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety": see Bentham, *Rationale of Punishment*, p. 20, quoted at p. 255 of Halsbury, *loc cit.*

I am respectfully of opinion that the true function of criminal law in regard to punishment is in a wise blending of the deterrent and the reformatory, with retribution not entirely disregarded, and with a constant appreciation that the matter concerns not merely the Court and the offender but also the public and society as a going concern. Punishment is, therefore, an art—a very difficult art—essentially practical, and directly related to the existing needs of society. A punishment appropriate to-day might have been quite unacceptable two hundred years ago and probably would be absurd two hundred years hence. It is therefore impossible to lay down hard-and-fast and permanent rules.

In an editorial note to *Rex v. Rotherham Licensing JJ.; Ex parte Chapman*, [1939] 2 All E.R. 710, it is said: "Where a discretion is given to justices or to any other tribunal the making of a general rule as to the manner in which that discretion will be exercised is inconsistent with the judicial exercise

of that discretion. The existence of the discretion of the tribunal requires that the tribunal shall consider each individual case upon its own facts."

Lord Hewart C.J. in that case said at p. 713: "It may well be that justices of discretion and experience might prescribe for themselves a general rule of that nature as a counsel of perfection, intending, and being able, to apply an unfettered discretion to the consideration of the merits of each particular case. The rule itself however, or the principle . . . seems plainly designed to prevent the application of an unfettered judgment to the individual case, and to prescribe in advance a hard-and-fast rule, save in exceptional circumstances . . . That seems to me to be an abdication of the duty of the justices impartially to consider upon the particular facts the merits of each individual application."

The tendency in recent years has been to impose more moderate sentences. At one time it was commonly assumed that the only purpose of punishment was to punish, but to-day its function is conceived in very different terms. It may be to try to reclaim the offender for society, to induce and stimulate habits of regularity and reliability, even to compensate partially for an education that ended prematurely, and generally to try to awaken in the mind of the vicious and irresponsible a sense of the obligations of life and citizenship. Such moderation in sentence may not be warranted in the case of confirmed criminals but in that of the first offender an effort at reclamation is surely the part of wisdom and prudence in judicial discretion.

In *Rex v. Duerden* (1942), 28 Cr. App. R. 128, the appellant pleaded guilty to the offence of having carnal knowledge of a girl aged twelve and was sentenced to ten years' penal servitude. The appeal was heard before the Lord Chief Justice, Mr. Justice Humphreys and Mr. Justice Cassels. Delivering the judgment of the Court, the Lord Chief Justice (Viscount Caldecote) said:

"The case was one of undeniable gravity. Some of the circumstances were such as to lead anyone to the conclusion that upon conviction the prisoner should be sentenced to a severe term of imprisonment or penal servitude, but we have formed the opinion that the sentence of ten years' penal servitude is one which should be reduced. There must sometimes be cases of such gravity and of such a character as to require



a sentence of ten years' penal servitude to be passed, but undoubtedly, within the memory of the members of the Court, the habits of the age have led to a reconsideration of sentences of this severity. Although a generation ago sentences of ten years' penal servitude were common, to-day they are rarely passed and, in the opinion of the Court should be very rarely passed.

"In this particular case, the appellant is sixty years of age, and a sentence of ten years' penal servitude is equivalent to a life sentence; but, quite apart from that circumstance, even if the appellant were younger than he is, in our opinion a sentence of five years' penal servitude would have been a proper one in the circumstances of the case.

"We think it right to make these observations with regard to sentences of more than five years' penal servitude. In this case, horrible though it is in some of its features, we think that a sentence of five years' penal servitude is both severe and adequate. We therefore reduce the sentence to one of five years' penal servitude."

In our own Courts, in *Rex v. Fox* (1925), 28 O.W.N. 154, 44 C.C.C. 262,—an appeal from sentence only where there was a conviction for rape and sentence of 14 years and 20 lashes—Hodgins J.A., in delivering the judgment of the Appellate Division, composed of Mulock C.J.O. and Magee, Hodgins, Ferguson and Smith J.J.A., said:

"The crime was a serious one and the Judge in sentencing the prisoner imposed the above sentence.

"It is however open to us, with due respect to his view as to what is an adequate penalty for the crime, to make the sentence such as will, in our judgment, best express our own opinion as to the proper duration and character of the punishment awarded in the circumstances disclosed by the evidence here. We think the sentence should be fixed at 7 years, together with 10 lashes within the first 14 months of imprisonment."

In the year 1933, when the appellant was four years of age, his parents returned from Canada to their former home in Torhaut, Belguim, taking the appellant with them. Within one year thereafter the father died. On the 10th May 1940, when the appellant was eleven years of age, Belgium was invaded and amidst the storm and tempest of ruthless war was overrun by

the German army. During the next four years, Belgium was under German military occupation and control. In 1945, during the liberation by the allied armies, Belgium was again subjected to the experience of invasion. One M. Lannoo, a qualified teacher and normal-school graduate (called as a character witness by the defence), who during that period was living in Torhaut but is now resident in Canada, and who for a period during those years in Belgium taught the appellant, testified to the fact that during that time there was much bombing, raiding, civil commotion and underground activity. Lannoo testified further that in the midst of the stress and strain of that period, aggravated by the indescribable after-complications of war, there resulted in the minds of the people, and especially in the attitude of the "teen-agers", a desperate confusion of values, which in the case of the appellant may have become more pronounced because of lack of paternal control. This witness further testified that during the time he had the appellant in his classes, he (the appellant) was of good behaviour and at no time exhibited irregular or illicit tendencies of any kind. The personal opinion of the witness, however, is that he (the appellant) "probably is weak".

The appellant is a first offender. There was no evidence of moral perversion. There was no physical violence visited on the complainant other than that of the rape itself and the crime was not rendered even more horrible by a conspiracy of two or more assailants. There was no evidence by which s. 1054A of The Criminal Code, enacted by 1947-48, c. 39, s. 43 and amended by 1950, c. 11, s. 19, could be invoked.

Having regard to all the circumstances, I am of opinion that the sentence should be substantially reduced. I would grant the appellant leave to appeal and would reduce the sentence to 5 years' imprisonment together with 10 straps, the first of which straps shall not be applied within 60 days of the date of this judgment, and all such straps should be administered within the first 18 months of imprisonment.

*Sentence reduced.*

*Solicitors for the appellant: Donohue, Maher & Garrett, Sarnia.*

[WILSON J.]

**Mighton and Mighton v. The County of Wellington.**

*Highways—Municipal Liability for Upkeep—What Constitutes Non-repair—Winter Maintenance—Failure to Sand—Negligence in Operation of Adequate System—The Municipal Act, R.S.O. 1950, c. 243, s. 453(1).*

The duty of a municipality under s. 453(1) of The Municipal Act is to keep its highways "in repair", and the standard of repair required rises with the wealth and population of the municipality. Even if a municipality adopts an adequate system of winter maintenance there may be liability if its servants charged with the operation of that system are negligent in the performance of their duties. While the decided cases indicate that the duty to sand a road in winter is not a matter of principle, nevertheless, in spite of the remarks of Fisher J.A. in *Edgeworth v. The King*, [1937] O.R. 721 at 729, a failure to sand may be want of repair sufficient to give rise to liability in damages.

Review of authorities.

AN ACTION for damages.

28th and 29th October 1952. The action was tried by WILSON J. without a jury at Guelph.

*J. A. Clare* and *D. H. Jack*, for the plaintiffs.

*B. J. Thomson, Q.C.*, for the defendant.

6th March 1953. WILSON J.:—This is an action for damages for personal injuries and property-damage which the plaintiffs, husband and wife, allege they have sustained in an accident as the result of the defendant's failure to keep a main county road in repair as required by s. 453(1) of The Municipal Act, R.S.O. 1950, c. 243, which reads as follows:

"Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall, subject to the provisions of *The Negligence Act*, be liable for all damages sustained by any person by reason of such default."

The accident occurred about 10 a.m. on 14th February 1952, when the plaintiffs' car plunged over the easterly bank of the south approach to a bridge across the Grand River on a main county road, no. 60, which also marks the easterly boundary of the village of Fergus and the westerly boundary of the township of West Garafraxa. The volume of traffic for nine months in the year was heavy, but during the winter only between 30 and 40 cars each day were estimated to use that portion which comprises the approaches to both ends of the bridge and the bridge itself.



The road is modern and up-to-date in construction with a hard surface of asphalt pavement, 16 feet 8 inches in width. Its shoulders slope away from it on either side. 200 feet south of the bridge it commences to narrow gradually to approximately 13 feet at the entrance to the bridge, which is not modern but is in good repair and capable of carrying a single line of traffic at any one time. The gravel shoulder on the east side of the road is 2 feet wide 150 feet south of the bridge and continues at this width to 50 feet south of the bridge, when it widens to 2 feet 8 inches 25 feet south and then narrows to almost nothing at the bridge entrance. On the west side the corresponding measurements are approximately the same. In addition to these shoulders there is on either side a further sloping area covered with grass and weeds in the summer-time but, of course, on the day in question covered with snow or ice. At the outer edge of these additional areas on either side there is a light plank guard-rail. At the point of the accident, approximately 11 feet 6 inches south of the entrance to the bridge, the area to the east of the shoulder is approximately 6 or 7 feet wide. When there is no snow or ice on the ground there is a slight slope from the centre of the pavement to the east shoulder and from there to the edge of the slope east of the shoulder.

On the day in question and for five or six days before it, the temperature had been below freezing—it was 6 degrees below zero on the night of 13th-14th February—and the travelled portions of the approaches to the bridge from both ends were covered with ice. The road had been snow-ploughed but the narrowing on the approaches prevented ploughing to the south end of the bridge. The unploughed portion was cleared of snow by hand-shovelling to the full width between the guard-rails to provide adequate drainage when the snow melted. Commencing at the south entrance to the bridge and continuing south for approximately 50 feet, there were two wide ruts about 4 inches deep made by traffic. It was under these conditions that the accident happened.

The plaintiffs lived on the husband's farm six miles in an easterly direction from Fergus. On the morning in question he left home about 9.30 and drove his wife toward town where she planned to board a bus which left at 10.17 but which she thought departed at 10.07. He had driven westerly along the county highway toward Fergus and rounded the sanded corner

at the Esso gasoline service-station 200 or 300 yards south of the bridge at approximately 15 miles an hour—perhaps a little less. As he approached the bridge he found that the surface of the road was packed hard and when he came to the ruts they seemed to him to be quite deep, very slippery and dangerous. He slowed down from the speed at which he had been travelling and drove his car with the left wheels between the ruts and the right wheels to the east of the easterly rut because he thought this was the safest place to drive. As will be seen from the photographs put in as exhibits, his tires were in good condition with a good quantity of tread and there were chains on the rear wheels. When he was a few feet south of the bridge itself his rear wheels slid into the ruts because of the slippery condition of the surface. This movement had the effect of throwing the front wheels to the right toward the embankment, and before the plaintiff could prevent it the car went forward through the guard-rails down the embankment on to the ice of the river.

The plaintiff Albert Mighton had been driving over this road for 30 years and was thoroughly familiar with it. Taking his evidence together with that of all other witnesses, one of whom had narrowly missed a similar experience earlier the same day, I find that he has discharged the burden cast upon him by s. 51(1) of The Highway Traffic Act, R.S.O. 1950, c. 167, of proving that he was not negligent: see per McTague J.A. in *Groves et al. v. The County of Wentworth*, [1939] O.R. 138 at 151, [1939] 2 D.L.R. 375, and Davis J. in *McCready v. The County of Brant*, [1939] S.C.R. 278 at 284, [1939] 3 D.L.R. 358.

It was argued that as a prudent driver he ought to have driven in the ruts and that had he done so the accident would not have occurred. Ordinarily, one would think that this would be so, particularly after considering the photographs that were put in as exhibits. But after consideration I think this argument fails. I am impressed rather with the oral evidence, which is strongly in the plaintiffs' favour. It establishes that this portion of the highway was well known to be dangerous when slippery, that the plaintiff Albert Mighton was driving carefully, and that earlier the same day another motorist had a narrow escape from going over the embankment at the same place as the plaintiffs did in spite of driving in the ruts. Moreover his driving must be judged not only, and mainly, having regard to the time, place and circumstances as they existed when the accident oc-

curred, but also by taking into consideration as a relevant circumstance that as a result of having driven over the same road for 30 years he undoubtedly knew of the defendant's adequate system of winter road-maintenance. He was entitled to assume that it would be operating efficiently enough to provide safe passage to the bridge if he drove carefully.

This system is described in dealing with the next point I shall consider, namely, the defendant's negligence.

The County had a system of winter maintenance under the supervision of the county engineer. It divided the county into districts with a sanding-foreman in charge of each. The districts were subdivided with a patrolman in charge of each subdivision. These were farmers who had much experience in their respective duties. In the district in question the sanding-foreman had worked for the County for 35 years and as sanding-foreman for 20 years. The patrolman in charge of the area in question had held his position for 22 years and he had assisted his father before that. He lived  $2\frac{1}{2}$  miles south of the bridge and had the reputation of being a reliable servant. The evidence disclosed that the County maintained stockpiles of sand with which salt was mixed in the proportion of 60 pounds of salt to 1 yard of sand, with more salt if the weather was really frosty. The stockpile for the area of the accident was a little over a half a mile away.

It was the duty of a patrolman, whenever he thought weather conditions required it, to inspect the roads under his care and to see that danger spots were sanded in the following order, first, the hills, then the curves, and then other places of danger. The approaches to the bridge had been sanded some time prior to the accident, but the sand was so thoroughly embedded below the surface of the ice that the surface was very slippery. On 10th February, four days before the accident, the place where it occurred was very slippery and dangerous for driving because of that fact. The patrolman stated that he did some sanding on 12th February between 3.30 and 4 o'clock in the afternoon, but sanding was not so effective in really cold weather. According to the evidence of the sanding-foreman, the colder the weather the more salt would be required. In any event, if sanding was done on the 12th, I think it was ineffective. One witness, James Riddell, who lived 300 yards south of the bridge, and whose evidence I accept, had complained in the preceding



December of the condition of the surface to the reeve of the Township of West Garafraxa, who was a member of the county council, about the dangerous condition of this approach and that the sanding had been "hit-and-miss". This was well known in the immediate vicinity and ought to have been known to the sanding-foreman as well as to the patrolman. I find, therefore, that he did not sand the approach to the bridge thoroughly enough, if he sanded it at all, and that his failure to do so, having regard to the length of time the dangerous condition existed and the steadiness of the weather, constituted negligence on his part and, therefore, negligence of the defendant.

I turn now to a consideration of the law respecting the liability of the defendant under the section of The Municipal Act quoted above, because it is not every state of disrepair of a highway which gives rise to liability.

The principles have been well settled and discussed in many cases, but as has been said by Kerwin J. in *McCready v. The County of Brant*, *supra*, at p. 282, the problem has been to apply them, and that is so in this case. There has been no real change in the principles since the earliest decisions, except that The Municipal Act now provides that the municipal corporation's liability is subject to the provisions of The Negligence Act, which permits an apportionment of liability where parties to a suit are each negligent or at fault.

In order that the conclusion at which I shall arrive may be fully understood, I find it necessary to review in some detail a number of the reported decisions. They indicate that the principle laid down in the leading case of *Foley et al. v. The Township of East Flamborough*, *infra*, has been applied to winter conditions, that the standard of repair rises with wealth and population, and that the "duty to sand a road" is not a question of principle, but that "failure to sand a road" may be want of repair sufficient to render the municipal corporation liable for damages upon that ground notwithstanding the language used by Fisher J. in *Edgeworth v. The King*, *infra*.

In *Caswell v. The St. Mary's and Proof Line Junction Road Company* (1869), 28 U.C.Q.B. 247, the plaintiff claimed payment of damages for injuries sustained when his wagon overturned in dangerous ruts at a soft spot two or three rods in length. The duty of the road company was to keep the road in repair. Adam Wilson J. said at p. 251:

"The evidence shews that but for the bad place where the accident happened it would not have happened, and also that the road at that place was dangerous, and that after the accident the defendants got the place cleared and made level by throwing off the snow and ice.

"It is by no means an easy matter to lay down any general rule on the subject, but it is clear that the company cannot be required to clear the snow off the ground whenever it falls, or even to remove the ice which may form there. It would frequently be an impossible work to attempt it, and it would be mischievous and a nuisance in some cases to effect it. Snow is looked for in this country and provided for as forming the best and most suitable means of travelling during the winter, and even when it falls to a great and unusual depth it is not the duty of any person or body of persons to remove it from the roads. Those who use them at such a time must use them as best they can while this natural and unavoidable impediment lasts.

"Nor can any one be required to remove the mud and mire from the road, caused by rain or by melting of the snow, for this, too, is an obstruction caused by a usual natural process.

"There are, however, cases where snow, and ice, and mud, may and must be removed from the road.

"If a particular part of it for two or three rods in length happens to be in a very dangerous condition, exceptionally and particularly dangerous as distinct from the rest of the road, and it can be put in a safe state and at a reasonable expense, there is no reason why it should not be made safe for travel, although it was caused by rain, snow or ice, or what may be called natural means . . .

"Or if snow collects at a spot, and by the thawing and freezing the travel upon it becomes specially dangerous, and if this special difficulty can be conveniently corrected by removing the snow and ice, or by other reasonable means, there must be the duty on the person or body on whom the care of reparation rests to make such place fit and safe for travel."

In *Foley et al. v. The Township of East Flamborough* (1897), 29 O.R. 139, Armour C.J. laid down the main principles governing the duty of road authorities to repair highways. This was not an action for damages arising out of an accident sustained under

winter conditions, but those principles have been applied to such cases. He defined "repair" at p. 141 as follows:

"The word 'repair', as used in the Municipal Act, has been held to be a relative term; and to determine whether a particular road is or is not in repair, within the meaning of the Act, regard must be had to the locality in which the road is situated, whether in a city, town, village, or township, and if in the latter, to the situation of the road therein, whether required to be used by many or by few, to how long the township has been settled, to how long the particular road has been opened for travel, to the number of roads to be kept in repair by the township, to the means at its disposal for that purpose, and to the requirement of the public using the road.

"All these matters are to be taken into consideration, and from them is to be deduced the quality of the repair necessary to comply with the terms of the Act.

"And I think that if the particular road is kept in *such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety*, the requirement of the law is satisfied." (The italics are mine.)

(The Divisional Court dismissed an appeal from a judgment of Boyd C. at trial dismissing an action against a municipality for damages arising out of non-repair of a township highway. The Court of Appeal, taking a different view of the facts, reversed the Divisional Court and sent the action back for a new trial: 26 O.A.R. 43. It did not overrule the statement of law set out above, which has been quoted with approval many times.)

In *Hogg v. The Township of Brooke* (1904), 7 O.L.R. 273, the plaintiff, travelling on a highway with a team of horses and a wagon, came to a place where the road had for some weeks been impassable for a distance of more than half a mile on account of drifted snow. At the side of the road, between the ditch and a farm-fence, was a temporary track made and used by the travelling public during the blocking of the highway, and it was safe while the frost lasted and the snow was hard. The path-master of the defendant was aware of the condition of the road, but took no steps to open it up. The plaintiff sustained injuries during a thaw which had commenced three days before the accident. It was held that in the circumstances it was the duty of the defendant to have opened up a way through the drift sufficient to enable vehicles, such as the wagon in which the plaintiff was travelling, to pass in safety along the highway; that the



defendant had notice that the highway was out of repair; and that the plaintiff was entitled to recover. Moss C.J.O. said at p. 281:

“The Municipal Act, which obliges . . . [township municipalities] to keep their highways in repair, and renders them civilly responsible for all damages sustained by any person by reason of default in observing the statute, also *enables them to make provision for the making and keeping open of township roads during the season of sleighing in each year*, and for providing for the application of so much of the commutation of the statute labour fund as may be necessary for keeping open such roads: sec. 561(8) and (9) . . .

*“These provisions shew the mind of the Legislature to be favourable to the maintenance of open highways in a condition to be readily and safely travelled upon during the winter as well as all other seasons of the year.*

*“And it may fairly be presumed that it was supposed that in placing these powers in the hands of the municipalities, they would be brought into requisition when occasion required or circumstances demanded it. It cannot be that municipalities may totally neglect the measures they are thus entitled to take and ask to be excused from liability for damages sustained by reason of their default.”*

Garrow J.A. said at p. 284:

*“In the case of Caswell v. The St. Mary’s and Proof Line Junction Road Co., [supra], it was held as far back as the year 1869, that while it would be unreasonable to hold the defendants bound to remove all the snow from a highway, it was not unreasonable to insist upon such removal where the obstruction was local and could be removed at a reasonable expense. In that case the obstruction is said to have been two or three rods in extent. Here it was undoubtedly much more considerable, but the principle is the same.”*

(The italics are mine.)

Britton J. said at p. 287, after discussing *Savage et ux. v. Bangor* (1855), 40 Me. 176: “Although that case is not a binding authority upon this Court, the reasoning is important, and it is perhaps better to go as far in the present case, and thus to recognize the fact that the trend of recent legislation and judicial decision is to compel additional watchfulness and care for the

safety of persons using highways in townships well settled and financially able to do more than was formerly done.”

In 1916, in *Cranston v. Town of Oakville*, 10 O.W.N. 175, Hodgins J.A. gave the plaintiff judgment in the following circumstances: The action was for damages for personal injury sustained by the plaintiff by being thrown from a sleigh upon Reynold Street, in the town of Oakville, on 18th February 1915, about 6.30 p.m. The plaintiff sat in a sleigh known as a “Gladstone cutter” facing backwards and was thrown out by a sudden jerk, caused by a depression or pitch-hole in the snow-road. He followed *Caswell v. St. Mary's and Proof Line Junction Road Company, supra*, and *Hogg v. The Township of Brooke, supra*, which, he said, was followed by the same Court in *Wallace v. Ottawa and Gloucester Road Co.* (1905), 6 O.W.R. 652, and awarded damages to the plaintiff. This judgment was affirmed by the Appellate Division, 10 O.W.N. 315, and an appeal from that judgment was dismissed by the Supreme Court of Canada in 1917, 66 S.C.R. 630, 39 D.L.R. 762, and the result was that the judgment at trial was affirmed. The Appellate Division had dismissed the appeal on an equal division. It cited no cases.

The basis of the trial judge's judgment was that the defendants were liable for negligence in not keeping this portion of the road in proper and sufficient repair.

In *McKinnon v. County of Wellington* (1916), 9 O.W.N. 486, a Divisional Court dismissed an appeal from the decision of a County Judge in favour of the plaintiff who sustained injuries after dark on 20th March 1915, when the plaintiff's buggy was overturned on a ridge of ice and dirt left in the centre of the road.

In *Davis v. Township of Usborne* (1916), 36 O.L.R. 148, 28 D.L.R. 397, the trial judge had held that because the defendant had constructed its road so as to be reasonably safe for purposes of travel by horse-drawn vehicles before the advent of the motor car, it had discharged its duty, but Meredith C.J.O. at p. 151 said:

“I am unable to agree with the view of the learned Judge that the respondents' duty was fulfilled if they had provided a road reasonably safe for the purpose of travel upon it before the advent of motor vehicles. It may be that it would have been unreasonable to require a corporation at once after motor vehicles came into use to make their roads, otherwise sufficient, safe for

travel under the changed conditions; but that is not this case. Motor vehicles have been in use for several years, and are a common means of transportation in general use throughout the Province, as well as elsewhere; and, in my opinion, the statutory duty imposed upon the respondents required them to make the road in question reasonably safe for the purposes of travel, and so safe from any additional danger incident to the use of it by motor vehicles."

*Edgeworth v. The King*, [1937] O.R. 721, [1937] 4 D.L.R. 136, was cited not only in this case, but also in other cases, as authority for the submission that no duty is cast upon a municipality to sand its roads, and for this reason I shall consider it at greater length than the others. The plaintiff's action was for damages arising out of an accident about 11.30 p.m. on 29th February 1936, as the result of the plaintiff's automobile skidding on a mass of rough ice on a provincial highway, and it was dismissed with costs. There were warnings in the form of flags and glowing red lanterns in conspicuous locations at both ends of the ice. Apparently alternate thawing and freezing weather made sanding of little, if any, use in the circumstances. The plaintiff knew of the icy condition, having driven over it only a short time previously, and the accident occurred after he had been drinking and while he was driving at a speed of 40 miles an hour. Upon these facts, which were more fully stated in the judgments of the Court of Appeal, the decision was against the plaintiff upon the grounds that the road surface was not even dangerous when reasonable care was exercised and that his carelessness in driving too fast was the real cause of the accident. Latchford C.J.A. said at p. 722:

"Here the conditions were not even dangerous when reasonable care was exercised . . .

"Returning westward, the plaintiff took no notice of the light at the east end of the ice, but drove onto it for the second time within two hours, at what he admits was a speed of 40 miles an hour.

"I think that no duty was owed to him by the defendant in the circumstances, and therefore the appeal should be allowed with costs, and the action dismissed with costs."

Fisher J.A. (with whom Henderson J.A. concurred), said at p. 729: "In my opinion, this highway was in a reasonable state of repair for those exercising ordinary care, and that the real



cause of the accident, as stated, was due solely to excessive speed and the disregard of all the warnings given."

The sanding of highways was discussed particularly in the judgment of Fisher J.A., but in my view the opinions expressed were really not essential to arriving at the conclusions stated and quoted above, but he did use the following language at pp. 725-6: "But the question is, was it out of repair and dangerous to drivers of motor vehicles exercising care? To answer that question consideration must be given to climatic conditions existing in the dead of winter in this Province, and to the fact that there are thousands of miles of paved highways in the Province to be considered. If the defendant is obliged to keep these highways free of ice, ruts and snow drifts, it would necessitate the employment of an army of men, not only to patrol the highways, but a larger army to remove ice and snow, to say nothing of a ruinous expenditure of money."

And later at p. 729 he said: "There may be an obligation on municipalities to sand sidewalks covered with slippery ice in busy streets, but there is no such obligation on the part of the defendant or of municipalities for sanding highways."

Dealing with the earlier paragraph, I note that this decision was given in 1937. It is a matter of public general knowledge that since then the provincial highway system has been greatly enlarged and vast sums of money are now spent upon thousands of miles of provincial highways to keep them open for commercial and private transportation the year round. Temporarily, and under severe weather conditions, there are interruptions in travel, but the very condition which seems to have been envisioned by Fisher J.A. has, as a matter of public service, actually come into existence on the provincial highway system, and what is true of it is also true in a relative sense of county highway systems, subject, of course, to the limitations upon their resources which the decisions herein referred to recognize. The defendant County, according to the evidence of its county engineer, who was called as a witness in this case, has successfully brought its roads up to standards required by present-day traffic conditions as a gradual and continuous programme with an adequate system of winter maintenance.

Dealing with the second paragraph, in my view the opinion that municipalities are not obliged to sand highways conflicts in principle with the trend of the decisions. The duty of the munic-

ipality is to keep its highways open for reasonable and safe travelling, having regard to its financial resources and the volume of traffic, improving its highways and its maintenance, including winter maintenance, as wealth permits and travel demands. At points of special danger it must give special attention, and I think in proper circumstances, this may include sanding or other proper measures to make the highway safe within the limits of the principles already quoted. As a logical deduction from the decision in *Caswell v. The St. Mary's and Proof Line Junction Road Company*, *supra*, where the Court, after finding that the defendant could not be required to clear the snow off the ground whenever it falls or even to remove the ice which may form there, held as part of the *ratio decidendi*:

“If a particular part of it for two or three rods in length happens to be in a very dangerous condition, exceptionally and particularly dangerous as distinct from the rest of the road, and it can be put in a safe state and at a reasonable expense, there is no reason why it should not be made safe for travel, although it was caused by rain, snow or ice, or what may be called natural means . . .

“Or if snow collects at a spot, and by the thawing and freezing the travel upon it becomes specially dangerous, and if this special difficulty can be conveniently corrected by removing snow and ice, or by other reasonable means, there must be the duty on the person or body on whom the care of reparation rests to make such place fit and safe for travel.”

Then, in *Hogg v. The Township of Brooke*, *supra*, Britton J. at p. 287, in that portion of his judgment already quoted, recognizes the fact that the trend of legislation and judicial decision is to compel additional watchfulness and care for the safety of persons using highways in townships well settled and financially able to do more than was done.

In *Groves et al. v. The County of Wentworth*, *supra*, Robertson C.J.O. reviewed many of the earlier cases and approved the statement of the law by Middleton J. in *Walker v. The Township of Southwold*; *Gosnell v. The Township of Southwold* (1919), 46 O.L.R. 265 at 273, 50 D.L.R. 176 (*sub nom. Township of Southwold v. Walker*; *Township of Southwold v. Gosnell*). He also quoted with approval the following passage from the speech of Lord Atkinson in *Sharpness New Docks and Gloucester and Birmingham Navigation Company v. Attorney-General ex rel. the*

*Mayor, etc., of The City of Winchester*, [1915] A.C. 654 at 665: "As the ordinary traffic expands or changes in character so must the nature of the maintenance and repair of the highway alter to suit the change."

In this case I think the municipality had an adequate system of highway improvement and maintenance, but there was negligence in respect of the latter, as I have already found, and for that it is liable to the plaintiffs.

I shall now consider the damages. The male plaintiff was driven to the Fergus hospital, where he was examined and released the same day. He sustained two cuts upon his head, his nose was scraped and he had a slight concussion. Some teeth were broken, his knees were sore, and the hearing in his left ear, which had been slightly impaired, was completely destroyed. He suffers from earache there and has a gnawing, buzzing noise in it. This disability, at least in so far as the loss of hearing is concerned, appears to be permanent. There was no evidence of loss of earning capacity, and I assess his general damages at \$1,750. His special damages in respect of his own personal injuries were \$48, and the loss in respect of his motor car was \$300, both of which I allow. His total damages therefore are \$2,098.

The damages sustained by his wife were a fractured skull, a fractured nose, which was very painful, a partially-obstructed left nostril, black eyes, and cuts on the chin, which was numb for some months. An injury to a cheek gives her some pain. Her right shoulder and side were twisted and gave her pain. Her knees were cut and scraped. For six months she had a sharp, stabbing pain on the left side of her forehead. She still has a residual disability of stiff knees which makes going up and down stairs difficult and also troubles her in getting in and out of a motor car. At times she loses her sense of balance and becomes afraid to walk or stand for fear of falling. When she loses her sense of balance she staggers to the right. This does not occur regularly, but she suffered from it three times during the week previous to the trial. Her right arm and hand become numb periodically and she can sew or write only for short periods at a time. She also suffers loss of memory which prevents her from giving recitations at church suppers or garden parties. She stayed in the hospital for three days. The doctor expressed the opinion that she ought to have remained longer, but the evidence



does not establish whether she left against his instructions. I assess her general damages at \$3,500. Her special damages amount to \$121, making a total of \$3,621. The plaintiffs will have the costs of the action against the defendant.

*Judgment for plaintiffs.*

*Solicitors for the plaintiffs: Wilson & Wilson, Fergus.*

*Solicitors for the defendant: Haines, Thomson & Rogers, Toronto.*

[ANGER J.]

### Beckerson and Beckerson v. Dougherty.

*Motor Vehicles—Negligence—Motorist Made aware that Children Playing near Street—Necessity for Additional Precautions—The Highway Traffic Act, R.S.O. 1950, c. 167, s. 51.*

The defendant was driving along a busy street when a boy ran out from behind a jeep parked at the side of the street and crossed the street, far enough ahead to make it unnecessary for the defendant to apply his brakes. He glanced around and proceeded, and as he came up to the jeep a second boy, the infant plaintiff, ran out and was seriously injured by the defendant's car. The defendant immediately applied his brakes, but the car travelled some 20 feet, dragging the child.

*Held*, the defendant had not proved that he was not negligent, as he was required to do to satisfy the onus under s. 51 of The Highway Traffic Act. *Whitten v. Burtwell* (1920), 47 O.L.R. 210, applied. If he had had no indication that children were near, and the first boy he saw had suddenly run into the path of his car from behind a parked vehicle, he would not have been guilty of negligence. But the appearance of the first child should have suggested that there might be a companion or companions, and a reasonably prudent man in the circumstances would have sounded his horn to warn of his approach, and would have slowed down so that if another child did run out he could stop instantly, and in any case his slow speed would minimize the injury. *Wilson v. Rebotoy* (1929), 64 O.L.R. 458; *Gargotch et al. v. Cohen*, [1940] O.W.N. 479, applied.

*Negligence—Contributory Negligence—Injury to Infant of Tender Years—Action by Infant, Suing by Father as Next Friend, and by Father personally for Expenses—Effect of Contributory Negligence of Father—The Negligence Act, R.S.O. 1950, c. 252, s. 4.*

Since contributory negligence of an infant of tender years did not disentitle him at common law to recover for an injury sustained, it is clear that ss. 4 and 5 of The Negligence Act do not apply to reduce his claim, or to reduce the claim of his father (suing for out-of-pocket expenses consequent upon the injury) by reason of the infant's negligence. *Gargotch et al. v. Cohen*, *supra*, followed. It is also clear that the infant's damages cannot be reduced by reason of any negligence on the part of his father, because the former doctrine of identification no longer applies. *Oliver v. Birmingham and Midland Motor Omnibus Company, Limited*, [1933] 1 K.B. 35, applied.

The claim of the father, however, is on a different footing. His claim for expenses incurred in the treatment of the child is a personal claim. *McKittrick v. Byers* (1925), 58 O.L.R. 158; *Hall v. Hollander* (1825), 4 B. & C. 660, discussed. Since he is a plaintiff in his own right, he comes squarely within the terms of s. 4 of The Negligence

Act, and his recovery from the defendant must consequently be reduced in proportion to the degree of negligence, if any, found against him. *Pedlar v. Toronto Power Co.* (1913), 29 O.L.R. 527, discussed. If, however, the expenses have been necessarily incurred for the infant's benefit, the father will be permitted to recover the excess out of the infant's damages. *Graham et al. v. Toronto Transportation Commission*, [1945] O.W.N. 904; [1946] O.W.N. 274, applied.

*Infants—Supervision—Absence of Supervision, or Inadequate Supervision, of Infant in Dangerous Place—Infant Permitted to Play on Busy Street—Failure in Supervision as Contributory Negligence of Father.*

It is negligence for a father to permit a very young child to play without adequate supervision on or near a busy city street, and if the child is injured while so playing the father's recovery will be reduced by reason of his contributory negligence. *Gargotch et al. v. Cohen, supra*; *Mercer et al. v. Gray*, [1941] O.R. 127; *Schofield v. Mayor, etc., of Bolton* (1910), 26 T.L.R. 230; *Pedlar v. Toronto Power Co., supra*, applied.

AN ACTION for damages.

17th and 18th February 1953. The action was tried by ANGER J. without a jury at Hamilton.

*Colin Gibson*, for the plaintiffs.

*Paul Philp*, for the defendant.

13th March 1953. ANGER J.:—This is an action brought by the infant plaintiff, born 20th February 1947, through his father as next friend, for damages for personal injuries sustained by him when struck by the defendant's automobile on 10th June 1951, the infant then being about 3 years and 4 months of age, and by the father for his out-of-pocket expenses incurred in the treatment of the infant.

The facts in the case are comparatively simple. The accident occurred on Barton Street in the city of Hamilton in the early afternoon of a clear day with dry road. According to Constable Gratz of the Hamilton police force, who investigated it, the accident occurred approximately opposite no. 1943 on Barton Street, which is a main thoroughfare, the pavement there being 28 feet wide with rough shoulders of about 10 feet in width on both sides. There was some sort of construction-work on the south shoulder, consisting of an excavation with dirt piled high on each side of it, leaving a flat shoulder about 5 feet wide between the pile of dirt and the pavement. There were houses on the north side of the street but no houses on the south side in that area. The only eye-witness who appeared was the defendant himself, then about 66 years of age. He said that he was driving east on the south side of Barton Street on his way home for

lunch, for which he was late, but that he was not in a hurry; his speed was about 20 to 25 miles per hour, the speed-limit being 30 miles per hour. The south shoulder described by Constable Gratz therefore was on the defendant's right. The defendant said that a grader and a jeep behind it to the east were parked on that shoulder off the cement, facing west. He said that a boy pushing a bicycle or tricycle ran out from behind the jeep when he was 35 or 40 feet away, but he could not say whether the point from which that boy ran out was 1 foot or 10 feet behind the jeep. He said that the boy crossed into the north half of the road so far ahead of him that he did not need to apply his brakes and did not apply them. He said that he glanced around, "took a look around", and saw no one. He said that when he got past the jeep a second boy, who turned out to be the infant plaintiff, ran out and struck the defendant's right front wheel. He said he did not see the boy until he hit him, when he slammed on his brakes, turned towards the centre of the road and dragged the child with him. The evidence of Constable Gratz showed that the defendant's skid-marks on the road, leading to the rear wheels of the defendant's car, were about 20 feet in length. It is clear, therefore, that the child was dragged that distance at least. The defendant said that he got out, walked around his car and picked up the child. The child was bleeding and there was blood on the road there. Another motorist, who had stopped on the north side of the road, offered to take the child away, so the defendant carried the child to that car. He said the police arrived in about five minutes. Constable Gratz said that when he arrived the defendant's car was facing north-easterly across the road, there being a blood-spot on the road about nine inches or a foot north of the centre-line of the road and opposite the right front wheel of the car.

There is some inconsistency about the time of the accident. The defendant says it was about 12.15 p.m. and that the police arrived about five minutes later. Constable Gratz said that he received a radio call from the police dispatcher about 1.10 p.m. to go there and that he arrived at the scene about 1.25 p.m. I do not think, however, that anything turns on the time, and I believe the defendant was just mistaken as to the correct time.

The defendant's evidence above mentioned is in substantial accordance with the statement given by him to Constable Gratz at the scene, as related by the constable, with one exception



relating to the nature of the vehicle from behind which both boys had run. The constable said that the defendant, in his statement, said that both boys had come out from behind a parked truck facing west. Since no truck was there when the constable arrived, he said, he asked the defendant where the rear end of the truck would be in relation to the blood-spot, and the defendant said that it would be approximately in line with the blood-spot. The constable said that the defendant said: "I believe I struck the boy where the skid-marks started and dragged him to where my car stopped." The constable said that the defendant had not been drinking but was confused as to where the point of impact was, the distance the boy had been dragged and where the vehicle was parked from behind which the boys ran in relation to the blood-spot on the road. On cross-examination he said that the defendant was confused, shaken up and elderly. When recalled in reply, he said that the defendant spoke to him about a truck, did not mention a grader or jeep and said that the truck was gone; that there was a grader east of the blood-spot, but he saw no jeep, although there could have been one, and that there were no vehicles west of the blood-spot or beginning of the skid-marks, at least where they could obstruct the view. On cross-examination, the defendant said that the scene of the accident was right opposite the jeep, but that when he returned after putting the child in the other motorist's car, the jeep had been moved from behind the grader to in front of it.

After the close of the evidence counsel for the plaintiff, in his argument, referred to the discrepancy between the defendant's evidence at the trial and his statement to Constable Gratz as to the kind of vehicle from behind which the two children had run, contending that the discrepancy affected his credibility. Now I had felt that the defendant, in giving his evidence, had been telling the truth as he understood it, but then realized that he had not been questioned in regard to his reference to a truck in his statement to the constable. After the argument I sent for counsel and told them that I wished to recall the defendant myself the next morning in order to allow him an opportunity to explain his reference to a truck, since a jeep is in a sense a small truck, so that I might have his evidence in that connection while considering my decision, which I had stated I was reserving. Both counsel opposed my recalling the defendant on this point but I stated that I did not wish the

point left in the air and that it was only fair to give him the opportunity, so I insisted, counsel for the defendant undertaking not to inform the defendant as to the point on which I wished further evidence from him. He was accordingly recalled, and stated that he did not remember referring to a truck in his statement to the constable but that if he did so, he meant the jeep. He added that he did not actually see the jeep moved after the accident but said that the wheel-marks made in moving it were plain to see. I permitted cross-examination by counsel for the plaintiff and re-examination by counsel for the defendant. Then, in answer to my question, the defendant said that the jeep had its canvas top up.

Before I allowed the cross-examination, counsel for the defendant took the surprising stand at that stage that I had had no power to recall the defendant after conclusion of the argument, my only power being to recall "during the trial". Since I had already concluded my questioning of the defendant, it was obvious that it was no use going into that phase of the law. In the event that my decision in this case is appealed by either party and that it should be held that I had no power to recall the defendant as I did, I wish to record that, throughout the defendant's evidence, I thought he was telling the truth, giving the facts as he understood them. There was not, in my opinion, any attempt on his part to distort the facts or to withhold any. Indeed, I think that his statement, volunteered to Constable Gratz and reiterated at the trial, that both boys came out from behind the same vehicle and that after the first boy ran on he had done nothing but look around, evidence very damaging to him, is cogent indication of his honesty. That he would be confused and upset at the time of the accident is to be expected, and that he could be confused as to the kind and location of the vehicle is understandable. I have no hesitation in accepting his evidence that both boys came out from behind some vehicle and that the accident happened substantially as he described it. Furthermore, I do not think that it is of any importance what sort of vehicle it was from behind which the boys ran out, the important point being that, on the defendant's own evidence, they came out from behind the same vehicle and that the accident then occurred in the manner I have described. It is that point that governs the fixing of responsibilities.

The principles of law that appear to apply to the facts pose some problems. I shall deal with the position of the defendant first.

It is so well and long established as not to need citation that negligence is failure to do what a reasonable and prudent man would do in particular circumstances or doing something that a reasonable and prudent man would not do in those circumstances, guided by considerations which ordinarily regulate human affairs, and that the standard of care required is relative to the circumstances—the greater the danger the greater the degree of care that is required. Children are not trespassers on a highway. They have as much right to cross a highway as other citizens have. Vehicles have no monopoly of a highway and, subject to signals by traffic-lights or traffic-officers, have only equal rights with pedestrians. It is common knowledge, however, that children commonly play together and that, not appreciating traffic dangers, they are likely to run out into the road without looking for traffic. All drivers must be taken to be fixed with that knowledge. It is a consideration which ordinarily regulates human affairs. There is, therefore a special duty towards children.

Lord Atkinson said in *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229 at 237: "The authorities from *Lynch v. Nurdin* (1841), 1 Q.B. 29 [113 E.R. 1041], downwards establish, it would appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; secondly, that public streets, roads, and public places may not unlikely be frequented by children of tender years . . . ."

And Lord Sumner said in *Glasgow Corporation v. Taylor*, [1922] 1 A.C. 44 at 67: . . . a measure of care appropriate to the inability . . . of those who are immature . . . is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations."

Constable Gratz testified that the defendant had not been drinking and that he tested the defendant's brakes, and that though they were of unequal application, pulling the car to the right, the right skid-mark being heavier than the left, they nevertheless stopped the car within the distance required by The Highway Traffic Act, R.S.O. 1950, c. 167, and did not prevent



the car from being turned to the left. It is clear, therefore, that negligence by the defendant could only be failure to do something that he should have done after the first boy ran out from behind the parked vehicle.

It was held in *Wilson v. Rebotoy*, 64 O.L.R. 458, [1930] 1 D.L.R. 273, that the duty cast upon the driver of a motor car depends upon circumstances of which he was or should have been aware, and upon what he expects or should expect, and his judgment can be based only upon outward acts or what would ordinarily be expected, so that there was no liability where a girl alighted from a bus, took a few steps away from a highway, turned and ran behind the bus upon the highway and into the defendant's car.

It seems clear under the authorities that, if the defendant had had no indication that children were near, and the first boy that he saw had suddenly run into his path from behind a parked vehicle, thus creating an emergency, making it impossible to avoid hitting him, the defendant would not have been guilty of negligence. Similarly, if the defendant had seen children playing on the north side of the road, he might not have been expected to anticipate that a child might run out from behind a vehicle parked on the south side. Where, however, a child ran out on to the road from behind a parked vehicle some 40 feet ahead of the defendant, as in this case, was that not an indication that the child might have a companion or companions who might do the same thing? I think that it was. The defendant said that, when he saw the first boy run out from behind the jeep so well ahead of him that he did not have to apply his brakes in regard to that boy, he did nothing but glance around. But is that enough, having regard to the fact that looking around would be comparatively futile, as he could not see through the grader and jeep, so as to be able to determine whether there were any other children at the spot? Is it not obvious that the parked grader and jeep created a danger-spot, having regard to the fact that the first child suddenly ran out from behind them? Negligence is the failure to take the care that a reasonable and prudent man would take—the greater the danger, the greater the degree of care that is required. Would not a reasonably prudent man have sounded his horn to warn of his approach and have slowed down until he was past the danger-spot, so that if another child were to run out from behind the grader or jeep

he could stop almost instantly and, in any event, the slow speed would prevent any great injury? When the defendant, on the contrary, merely looked around, although unable thereby to see if other children were behind the grader or jeep, and proceeded on his way with unabated speed and without sounding his horn to warn of his presence, did he not, in common parlance, "take a chance", and is that not failing to be prudent? If it is, and I think it is, then it was lack of care that constitutes negligence. I agree with counsel for the plaintiff who contended that the sudden appearance of the first child from behind the jeep was a warning that there might be other children similarly out of view and that the plaintiff should have governed himself accordingly by reducing his speed and sounding his horn. In his examination for discovery, q. 86, he said he did not honk his horn and in qq. 37, 98 and 103, he said he did not pay much attention to the first boy who ran out with a bicycle or tricycle.

In *Gargotch et al. v. Cohen*, [1940] O.W.N. 479, [1940] 4 D.L.R. 810, a case in which a child a little over 6 years of age was attending school and, when coming out of school, passed between parked cars and was struck by a car owned by the defendant Cohen and driven by the defendant McLennan, Hogg J. (as he then was) said at p. 480: "The defendant was proceeding at a moderate rate of speed because there is evidence that his motor car was brought to a stop within three or four feet after the impact between the car and the infant plaintiff. However, McLennan was not proceeding cautiously enough under circumstances which were known to him, namely, that children were coming out of the school and crossing the road in front of him along which he was driving, and his car was proceeding, although at a moderate speed, nevertheless not slow enough in view of the fact that small children were crossing a narrow stretch of pavement directly in front of him." He added that the child was of such tender age as not to appreciate the danger to which he might be subject from passing motor cars.

It seems to me that that reasoning applies even more strongly to the facts of the case before me, because the defendant was not going at a speed that enabled him to stop in 3 or 4 feet but it took him 20 feet of skidding to stop, indicating a speed of about 25 miles per hour, which he admits, and at that speed it would be virtually impossible for him to avoid seriously injuring a second child who might suddenly emerge from behind

the vehicle parked almost immediately to the defendant's right, for, as he said in q. 18 of his examination for discovery, he was driving about a foot from the edge of the pavement.

Under s. 51 of The Highway Traffic Act the onus is on the defendant in this case to show that the damage did not arise through his negligence, which means that he is liable unless he proves that he was not negligent: *Whitten v. Burtwell* (1920), 47 O.L.R. 210. I think that the defendant has failed to discharge that onus.

The question then arises whether the defendant is to be held solely to blame and liable to pay all assessed damages. In that connection the position of the infant plaintiff and the plaintiff father must be considered separately.

It is clear under the authorities that at common law contributory negligence by an infant of tender years does not disentitle the infant to recover for an injury sustained, although it is otherwise where the injury is occasioned entirely by the negligence of the infant: *Gardner v. Grace* (1858), 1 F. & F. 359, 175 E.R. 763, involving a child 3½ years old; followed in *Sangster et al. v. T. Eaton Co. (Limited)* (1894), 25 O.R. 78, affirmed 21 O.A.R. 624; 24 S.C.R. 708, involving a child 2½ years old, and in *Merritt v. Hepenstal* (1895), 25 S.C.R. 150, involving a child apparently 3 years old; *Oliver v. Birmingham and Midland Motor Omnibus Company, Limited*, [1933] 1 K.B. 35, involving a child 4 years old; *Hudson's Bay Company v. Wyrzykowski et al.*, [1938] S.C.R. 278, [1938] 3 D.L.R. 1, involving a child 4 years old, per Hudson J. at p. 294, concurred in by Duff C.J., Kerwin J. and Davis J. Consequently, it was laid down in *Gargotch et al. v. Cohen, supra*, at p. 481, that the provisions of The Negligence Act, now R.S.O. 1950, c. 252, ss. 4 and 5, regarding apportionment of damages in proportion to the degrees of negligence of the respective parties, cannot be applied to reduce the claim of an infant plaintiff of tender years, in that case 6 years and 4 months, so that the defendant must pay the full amount of damages, and that such provisions cannot be applied to reduce the adult plaintiff's damages by reason of the infant's negligence, as would be done if the infant were not of tender years.

It is also clear that the infant's damages in the case before me cannot be reduced by reason of any negligence on the part of the plaintiff father because the former doctrine of identifica-



tion no longer applies. This doctrine, under which a child of tender years in another person's control was so identified with the latter that the latter's negligence contributing to the child's injuries was a good defence to an action brought on behalf of the child, was laid down in *Waite v. The North Eastern Railway Company* (1859), E.B. & E. 728, 120 E.R. 682, but that case was first impliedly overruled in *Mills et al. v. Armstrong et al.*; *The "Bernina"* (1888), 13 App. Cas. 1, and then expressly overruled in *Oliver v. Birmingham and Midland Motor Omnibus Company, Limited, supra*, where a Divisional Court said that the doctrine was no longer the law and confirmed that the negligence of a grandfather, while conducting a child of 4 years across a road, did not disentitle the child to recover for injuries sustained when struck by an omnibus. This last case was cited by Hudson J. in his judgment in *Hudson's Bay Company v. Wyrzykowski et al., supra*, at p. 294, where he said that if the mother in charge of the child in the case had herself been guilty of negligence, this would provide no defence once it was established that there was negligence on the part of the defendants contributing to the accident. It is clear that an attempt to apply the provisions of our Negligence Act, so as to restrict the damages recoverable by the infant from the defendant according to the degrees of negligence that might be attributed to the defendant and adult plaintiff respectively, would amount to a revival of the doctrine of identification and would be erroneous accordingly. The defendant must, therefore, pay the full amount of the damages of the infant plaintiff as hereinafter assessed.

The claim of the plaintiff father stands on a different footing. It is to be borne in mind that his claim for expenses incurred in the treatment of his child for injuries is not a claim by the child through his father as next friend, but is necessarily a personal claim by the latter. It seems desirable to allude to his status before dealing with the question of his negligence. In *McKittrick v. Byers*, 58 O.L.R. 158, [1926] 1 D.L.R. 342, it was held that the father of a child of 9 who was injured by the negligence of a third party had no better right of action than the child and the contributory negligence of the child before The Contributory Negligence Act of 1924 operated to bar the child's claim, and also that of the father for damage sustained by him as a result of the accident; the trial judge with a jury had allowed the father his expenses and the appeal was allowed

in this respect. Riddell J.A. said at p. 163: "In *Hall v. Hollander* (1825), 4 B. & C. 660 [107 E.R. 1206], it is laid down that in a father's action for injury to his son by negligence the gist of the action is the loss of service to him by such injury, and if the child could not perform service the action failed. In other words, the child is for the purpose of such an action in the position of a servant . . . It is true that in this case the son was acting as a servant of his father; but the law has not yet given the parent a right of action for injury to a child *qua* child—and he must rely upon the services his child can render him *qua* servant: *Hall v. Hollander, ut supra.*"

In *Hall v. Hollander*, however, it was shown that a parent had two causes of action, one for loss of services and the other for expenses. In that case, in which a child  $2\frac{1}{2}$  years of age was injured by a carriage, the plaintiff father's claim for damages and expenses was nonsuited, as the child was not competent to perform services. On appeal, however, the question was raised whether the father might not have sustained a special action for expenses if they had been necessarily incurred. Bayley J. said that it was contended that the action was maintainable on two grounds, first, for the loss of services of the child, and secondly, for the expense incurred by the father in consequence of the injury sustained by the child. He said that with respect to the first ground the gist of the action depended upon the capacity of the child to perform acts of service, and in that case it was manifest that the child was incapable of performing any service. He went on to say at p. 662 that if it had been proved that the father necessarily incurred expenses, he would not be prepared to say he could not have recovered upon a declaration describing as the cause of action the obligation of the father to incur that expense. It was shown, however, that the child had been receiving care without expense to the father, who unnecessarily took the child home and thereby incurred expense which he would not otherwise have incurred, so the nonsuit was sustained.

It seems clear, therefore, that a father is entitled to recover necessary expenses under his obligation to supply necessities, whether or not the child is capable of performing service. Certainly *Hall v. Hollander* is no authority to the contrary, and this principle seems to be thoroughly established in the long line of cases in our Courts in which the adult plaintiff's claim for expenses is always advanced and allowed, as in *Gargotch et al.*

*v. Cohen, supra*, whether or not reduced by contributory negligence of the injured child. In the case before me the father certainly incurred expenses for the treatment of his child, and the only remaining question is whether his claim for them is to be reduced by contributory negligence on his part.

In *Gargotch et al. v. Cohen, supra*, where a child 6 years and 4 months of age was struck by a motor car as he was leaving school Hogg J. (as he then was) said that no authority had been cited that upheld the principle that it was negligence on the part of a parent or guardian to allow a child to go to and come from school unattended through city streets. In *Mercer et al. v. Gray*, [1941] O.R. 127, [1941] 3 D.L.R. 564, where an unaccompanied child between 6 and 6½ years of age was injured by the defendant's motor car at an intersection, the jury, in answer to the trial judge's questions, found the defendant guilty of 80 per cent. of the negligence, the child guilty of 15 per cent. of the negligence, in not following his parents' instructions as to precautions, and the parents guilty of 5 per cent. of the negligence in over-estimating the child's intelligence. McTague J.A., delivering the judgment of the Court of Appeal, ordered a new trial, saying it was difficult to understand why any question as to the parents' negligence was put, since neither parent was there, and that the question should not have been put.

Whatever may be said as to the parents' obligation when a child has reached the age when he can go to school, or otherwise go about on the streets, it seems clear that it is negligence on the part of parents to allow very young children to wander unattended into dangerous places.

In *Schofield v. Mayor, etc., of Bolton* (1910), 26 T.L.R. 230, where a child 1 year and 9 months of age went into a field belonging to the defendant in order to play in a sand-pit as other children did, and thence wandered somehow on to a railway level-crossing and was injured, Vaughan Williams L.J. said that the accident was not caused by any act or omission of the defendant and that the real *causa causans* of the accident was the gross neglect of the father and mother in allowing the child to go into the field alone, his views being concurred in by Farwell L.J. and Kennedy L.J.

In *Pedlar v. Toronto Power Co.* (1913), 29 O.L.R. 527, 15 D.L.R. 684, affirmed 30 O.L.R. 581, 19 D.L.R. 441, where a child 2 years and 2 months old was drowned by falling, apparently,



from a narrow bridge leading to a tower built by the defendant in Burlington Bay, and the parents sued under The Fatal Accidents Act, Middleton J., as trial judge, dismissed the action on the ground, amongst others, that the plaintiffs' right to recover was barred by their own contributory negligence, as they knew of the peril and allowed the child to be at large without supervision, and his decision was affirmed on appeal.

In regard to a dangerous place, I can see no distinction in principle between a railway, a waterway and a highway. No case was cited to me, and I have been unable to find any, to the effect that a parent's claim for expenses incurred through injury to his child comes within the purview of s. 4 of The Negligence Act, but I have reached the conclusion that it does because, first, if *Pedlar v. Toronto Power Co.*, *supra*, was rightly decided, and I do not suggest otherwise, it obviously follows that parents' contributory negligence which would bar recovery under The Fatal Accidents Act does not disappear if the child survives, but then remains to be disposed of, and, secondly, s. 4 of The Negligence Act in terms, applies to it. It provides as follows:

"In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively."

In this case the father is a plaintiff in his own right for damages consisting of his expenses incurred in treatment of the infant plaintiff and I think that the above provision applies to him.

The question then is whether the plaintiff father was negligent. In his examination in chief he said that they had an arrangement that, when the children were playing in a group, one of the mothers living around there would look after them, but he did not enquire whether that had happened on the day of the accident. On cross-examination he said that he did not know whether his son was supervised; that he lived at 286 Adair Street at the corner of Barton Street, several hundred yards from the scene of the accident; that it was not his habit to allow his children to wander that far on a busy street, but that his son must have wandered there. The defendant testified that he did not see any adult supervising the children, and after the accident

no adult who was supervising the children came up to him. No further evidence as to supervision was tendered.

Now, the cases I have cited show that the absence of supervision of a very young child in a dangerous place is a fact which constitutes negligence. It is true that the general rule is that a defendant who alleges contributory negligence must prove it, but it is obvious that to prove a negative, the absence of supervision, his means of proof are very limited. He can only give evidence that he saw no indication of supervision, the actual fact of supervision being something peculiarly known only to the plaintiff. When evidence has gone in tending to show absence of supervision, I think it is incumbent upon the plaintiff to reply by affirmative evidence of supervision. Again, although the doctrine *res ipsa loquitur* does not necessarily apply to indicate absence of supervision, I think that it applies sufficiently at least to call for explanation as to how the child was able to run out on to the road. No explanation was offered. For these reasons I think that, in justice to the defendant, I am bound to infer that the child in this case was either not supervised or not adequately supervised. The plaintiff father is a pensioner who does not work and could have supervised the child himself, but if he chose to have another person do the supervising, that person would be his agent whose negligence would be the father's negligence.

For the foregoing reasons I hold that the plaintiff father was guilty of contributory negligence, and the remaining question is the degree of negligence to be attributed to him. There is no law that a child of tender years must be tethered while at play, or held on a leash or by the hand. Children must be allowed to play in our way of life. It is obvious, therefore, that if some person were supervising the play of several children, or a group, as would be permissible, that person's ability to prevent a child from running into a road would be limited, for children are quick in their decisions and movements. I think, therefore, that as between the defendant and the plaintiff father, in regard to the latter's expenses, the major part of the total negligence must be assessed against the defendant, and consequently I assess the defendant with 70 per cent. of the negligence and the plaintiff father with 30 per cent.

As to the infant plaintiff's damages, he was badly injured. Dr. J. W. McNichol, who treated the child's main injury by

plastic surgery, said that when he was called to the Hamilton General Hospital on the day of the accident he found that the child had suffered a very serious injury to his left foot, consisting of an extensive evulsive laceration with marked tissue loss over the front of the left leg, ankle-joint and upper portion of the foot. This injury is shown in the photograph (ex. 2) taken by the doctor before treatment. In brief, his evidence was, as indicated in that photograph, that the soft tissue or flesh was rubbed away, exposing the main tibia-bone making up the ankle-joint and the epiphyseal plate which controls longitudinal growth, and also fraying for three-quarters of its thickness one of the major tendons which allow bending of the ankle, the local structures crossing the injured area also being evulsed or rubbed away. He also said that the skin-edges were badly crushed and surrounded by a brush-burn for about  $\frac{1}{2}$  inch beyond all margins of the wound. He said that to cause these injuries the foot would have to be held in contact against a pavement or other object and pulled along like the operation of coarse sandpaper on a board. There can be no doubt that the child's foot was rubbed against the pavement for about the 20 feet indicated by the skid-marks. The doctor also said that the child had a brush-burn over the right side of the forehead and below the hair-line, and a similar extensive brush-burn over the left kneecap. The child was given a general anaesthetic, all dirt was removed from the injuries by a surgical brush and pressure-dressings were applied. As to the foot injury, the doctor said that all damaged and semi-devitalized tissue was removed, a large pedicle flap, consisting of skin and underlying soft, fatty tissue, having an area of  $4\frac{3}{4}$  inches by  $3\frac{1}{2}$  inches, was then raised from the inner rear of the thigh, thus leaving a defect in the thigh which was covered by a free split-thickness graft, being the upper half of skin taken from the front mid-trunk of the child and transplanted to the thigh, where it was held by sutures and accurately-planned pressure-dressing, getting its nourishment from its new bed, the other deep half being left on the trunk to heal in 10 days or 2 weeks. The large pedicle flap was then swung across and fitted and sewn into the wound on the left leg, as shown in the lower photograph in ex. 3, being there immobilized by the plaster framework shown in the upper photograph of ex. 3. This pedicle flap could not be detached from the thigh, else it would die, so the position indicated was maintained for 24 days, at which time



the base of the flap was divided, separating the foot from the thigh. The photographs in ex. 4, taken after 4 months, show the foot and thigh grafts described by the doctor as an excellent result, the child then having a relatively normal range of motion in the ankle and no pain. There has been no permanent impairment.

When this case first came before me on 10th February 1953, with other counsel for the defendant, it appeared that counsel for the plaintiff had undertaken to produce the infant plaintiff for physical examination in Hamilton under s. 74 of The Judicature Act, R.S.O. 1950, c. 190, the infant being in Halifax, but that lack of means prevented such production. Consequently, it was arranged before me that the plaintiff's statement of claim might be amended by deleting from para. 7, with reference to the child's foot, the words "which had been seriously impaired for life", and that the case be then proceeded with without such examination, and I granted leave so to amend upon counsel for the plaintiff, at my request, obtaining from Dr. McNichol, who was then in Court, assurance that the child had no permanent disability. At the ensuing trial the doctor said that the child had escaped the complications that might easily have arisen.

It is unquestionable, however, that the child suffered much pain and discomfort. The doctor said that the child would suffer pain from his head injury; would have headaches and a burning pain due to the brush-burn and that the brush-burn on the knee-cap would be more painful because it was larger and would last some time. In regard to the foot injury he said that such an injury would cause severe pain, although the severing of nerves when tissue is crushed is nature's way of being kind, so that it would not be as painful as otherwise. In regard to the immobilizing of the graft by means of the plaster frame, he said it is a painful position until all of the muscles relax, and that there would be considerable discomfort at first, but that it is easier in the case of a child than in the case of an adult patient, because a child is not muscle-bound. He said that the child would suffer pain and discomfort for 2 or 3 months, but thereafter would be comfortable. Notwithstanding the recuperative powers of children, and that this child, by reason of skilful treatment, has made a good recovery, his damages for pain and suffering and discomfort should not be minimized but should

be substantial. I think that an assessment of such damages at \$1,500 is fair and reasonable to both parties.

In regard to the expenses claimed by the plaintiff father, they total \$915.10, consisting of the hospital account for \$250.10, the account of Dr. McNichol for \$510, the account of Dr. T. C. Clark for \$75, for giving first treatment to the child, assisting Dr. McNichol and attending the child in hospital, and the account of Dr. R. I. Probert, the anaesthetist, for \$80. Counsel for the defendant said he did not dispute these accounts. They are unpaid and should be paid.

There will, therefore, be judgment against the defendant in favour of the infant plaintiff, Ronald K. Beckerson, for \$1,500, and in favour of the adult plaintiff, Jack T. Beckerson, for \$640.57, being 70 per cent. of \$915.10, together with one set of costs of the action. The expenses of \$915.10 were necessarily incurred by the adult plaintiff for the benefit of the infant plaintiff, and *Graham et al. v. Toronto Transportation Commission*, [1945] O.W.N. 904, affirmed [1946] O.W.N. 274, is authority for deducting from the infant's share the portion of the father's expenses not recoverable from the defendant, so the sum of \$274.53 will be deducted from the \$1,500 awarded to the infant plaintiff, and be paid to the plaintiff, Jack T. Beckerson, and the balance of \$1,225.47 will be paid into court to the credit of the infant plaintiff, Ronald K. Beckerson, subject to such further order as may be made from time to time respecting disposition of the moneys in Court.

*Judgment accordingly.*

*Solicitor for the plaintiffs: Harry F. Hazell, Hamilton.*

*Solicitors for the defendant: Walsh & Evans, Hamilton.*

[LEBEL J.]

**The Township of Trafalgar v. Hamilton.**

*Municipal Corporations—Restrictive By-laws—Binding Effect on Subsequent Purchasers without Notice—Necessity for Registration—The Registry Act, R.S.O. 1950, c. 336, s. 74(1).*

*Real Property—Registration—What Instruments to be Registered—Restrictive By-laws of Municipalities—The Registry Act, R.S.O. 1950, c. 336, ss. 1(d), 1(e), 74(1).*

A municipal by-law establishing a "restricted area", and prohibiting the use of property within the area for other than stated purposes, "affects" the lands within the area, and is therefore an "instrument" within the definition in s. 1(d) of The Registry Act, and will not bind subsequent purchasers and mortgagees for valuable consideration without actual notice of the by-law unless it is registered in accordance with s. 74(1) of the Act. *Re W. J. Blainey Ltd. and The City of Toronto*, [1935] O.R. 476 at 477; *Grimshaw v. City of Toronto* (1913), 28 O.L.R. 512 at 514, applied; other authorities considered.

AN ACTION for an injunction.

17th and 18th February 1953. The action was tried by LEBEL J. without a jury at Milton.

*J. T. Weir*, for the plaintiff.

*H. G. Chappell*, for the defendant.

17th March 1953. LEBEL J.:—The plaintiff's claim in this action is for an injunction "to restrain the Defendant from operating her property as a tourist home for overnight guests".

In September 1947 the defendant bought and paid \$25,000 for a rather large house called "Avalon", on highway no. 2, a short distance east of the town of Oakville, in the township of Trafalgar. Up to that time it had always been used as a private residence. Before making the purchase she inquired of the owner and others, including the deputy reeve of the plaintiff municipality, to ascertain if there were any municipal restrictions upon the use of the property as a tourist-home or as a tea-room and she was told that there were none. The defendant did not learn about the municipal by-law in question in this action until after she had made her purchase, and accepting her uncontradicted testimony on the point, as I do, I find that she had no notice, actual or constructive, of its existence until after she caused her deed to be registered.

The plaintiff called evidence to prove that on two occasions—one in October and the other in November 1951—the defendant let single rooms to overnight guests. I accept this evidence, believing, as I do, that the defendant has forgotten about both



incidents. And it was admitted by the defendant that she had caused an illuminated sign to be erected on her property in plain view of passing motorists and others. It reads, "Avalon—Accommodation". I am quite unable to accept the view that these words were merely meant to inform the public that she had apartments to let, as her counsel submitted.

The by-law, no. 530, was passed by the plaintiff municipality on 1st May 1944 and was duly approved by the Ontario Municipal Board, as the law requires. By s. 1 the area within which the defendant's property is situate is declared "a restricted area". Section 2 reads:

"No lands within the said area shall be used for, and no buildings shall be erected on said area, for other than residential, market gardening, fruit growing or agricultural purposes, excepting as may be required for municipal, educational, electric sub-stations, telephone exchanges, with their accessory buildings, or governmental purposes. Providing that under no circumstances shall this by-law be considered to prohibit the use of any dwelling or portion thereof for dental or medical purposes."

The by-law was amended in 1952 but the amendment is not material except in so far as it may affect the validity of the by-law, about which I shall say something at the end.

The main argument of counsel for the defendant is that since his client purchased without actual notice of the by-law, she is entitled to the benefit of s. 74(1) of The Registry Act, R.S.O. 1950, c. 336. The submission is that notice of the by-law should have been given by registration in the proper registry office, and that since this was not done, the by-law must be adjudged to be fraudulent and void as against the defendant under this section. The opposing contention is that registration of the by-law was unnecessary and the question thus squarely raised is one of some importance. My brother Wells found that he was not required to answer it in the circumstances obtaining in *The City of Toronto v. Rudd and Rudd*, [1952] O.R. 84 at 93, [1952] 2 D.L.R. 578, but in the present case it was not proved, as it was there, that the purchaser's solicitor had knowledge of the by-law's existence and hence that his knowledge was to be attributed to his client.

By The Municipal Act, 1913 (Ont.), c. 43, s. 406(10), a municipality was empowered to declare a highway or any part

of a highway a residential street. Section 406 was re-enacted by 1941, c. 35, s. 13, and the powers of a municipality were extended to enable it to prohibit the use of land and buildings within any defined areas or abutting on any defined highway for or except for such purposes as were set out in the by-law. These powers, except for an immaterial change since made to clause 2, are the same as are now to be found in s. 390(1), clauses 1 and 2, of The Municipal Act, R.S.O. 1950, c. 243. These clauses read:

"By-laws may be passed by the councils of local municipalities:

*Restricted Areas*

"1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law, within any defined area or areas or abutting on any defined highway or part of a highway.

"2. For prohibiting the erection or use of buildings or structures for or except for such purposes as may be set out in the by-law, within any defined area or areas or upon land abutting on any defined highway or part of a highway."

It should be observed that while clause 2 professes to restrict the use of buildings, it, like clause 1, is restrictive of the use of land, for, obviously, if the erection or use of a building is prohibited except for certain purposes, the use of the land on which it stands, or is to stand, is similarly prohibited. In any event, this by-law declares that the area of land which it describes by metes and bounds is "a restricted area".

Both The Registry Act and The Municipal Act contain provisions dealing with the registration of municipal by-laws. By s. 307 of the latter enactment money by-laws, except for the issue of certain kinds of debentures, are required to be registered, and there is a special provision in s. 350 as to the registration of draft plans for the "establishing or laying out, or for extending, widening or diverting a highway or part of a highway" when the municipality proposes to pass a by-law respecting such an undertaking. Section 73 of The Registry Act calls specifically for the registration of by-laws relating to opening and closing streets or effecting changes in municipal boundaries. Section 73(4) speaks of the manner of authenticating money by-laws for purposes of registration, s. 21(5) requires a Regis-

trar to keep a special by-law book for the registration of such by-laws, and s. 34(1) makes an affidavit of execution unnecessary for purposes of registering a "by-law or other instrument under the seal of any corporation".

In my opinion these statutory provisions do little, if anything, to furnish a solution to the problem here. All they do, it seems to me, is to carry forward from older legislation provisions which required that municipal by-laws of certain kinds be registered and indicated in some instance the manner in which they should be registered. It was necessary to make mention of some types of by-law in the older legislation because the statutory definition of the word "instrument" then included only a "municipal road by-law". It was not until 1910 that the statute 10 Edw. VII, c. 60, re-enacted The Registry Act and by s. 2(d) substituted the words "municipal by-law" for the words "municipal road by-law". The change was a substantial one and has, I think, a direct bearing on the outcome of this case. Section 2(d) of the Act of 1910 is now s. 1(d) of the present Registry Act. It provides that an "instrument" includes, *inter alia*, "a municipal by-law" and finally "every other instrument whereby land may be transferred, disposed of, charged, encumbered or affected in any wise, affecting land in Ontario".

Section 74(1) of the Act, the all-important section, reads: "After the grant from the Crown of land, and letters patent issued therefor, every instrument affecting the land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless the instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims."

Counsel for the plaintiff has seized upon the words "affecting the land" in this subsection and "affecting land in Ontario" in s. 1(d). The argument, briefly stated, is that before an instrument can be said to "affect" lands it must have some bearing on the title of the lands, and the authority relied upon is *Ontario Industrial Loan and Investment Company v. Lindsey et al.* (1883), 3 O.R. 66 at 75, where Hagarty C.J. said:

"In the sense of 'affecting' the lands I think we must hold that the instrument must have some bearing on the title, professing to convey, charge, or affect it by its own operation:



that an assertion that some one else claims to have an interest, or that the registered title of some other person is defective, does not come within the statute, in the words of the 2nd sec. (R.S.O. ch. 111,) of the Act 'every other instrument whereby lands or real estate may be transferred, disposed of, charged, incumbered, or affected in any wise in land [law] or in equity' ".

But the document in that case was registered by a person who thereby claimed that the land was his and that he would on the demise of another person commence proceedings for its recovery. It thus merely asserted that the person disputed the registered owner's title to the land, and the Court held that under the then-existing statute it should not have been registered. And that, I have no doubt, would be the result in a similar case to-day. The document was certainly not one which affected the lands "by its own operation" to use the Chief Justice's important phrase, and that phrase, in my opinion, is the gist of his reasoning. I am satisfied that By-law 530 in this case is in its nature something totally different from the document dealt with by the Chief Justice in the *Lindsey* case, and I am therefore quite unable to accept the submission that it has no bearing upon the matter of title and does not by its own operation affect the lands in question. For that reason I do not think the authority from which I have just quoted assists the plaintiff.

Another case should be mentioned, *viz.*, *The City of Toronto v. Jarvis* (1895), 25 S.C.R. 237. There the question was whether it was necessary to register a parol agreement giving permission to a municipality to construct a drain, and it was decided under the Act as it then stood (R.S.O. 1887, c. 114, s. 83) that such permission created an easement or an irrevocable licence, which was in either case (see p. 242) an interest in land, and that notice of the agreement should have been registered. In the course of his judgment, however, Strong C.J.C., at p. 244, expressed himself as being of the opinion that had there been a municipal by-law authorizing the taking of the land for the purpose of the drain, it would have been unnecessary to register the by-law. But at that time the Act made no provision for the registration of municipal by-laws as it does now, and had an "instrument" been defined then as it is now, I doubt whether the Chief Justice would have expressed himself as he did, for, as I have said, he had already held that the agreement before him created an interest in land.

It is true that the Chief Justice in the case just cited said at p. 244 that registration of the by-law would have been unnecessary because "publicity would have been given to the title of the municipality to the land taken up by the sewer, which . . . [would be] entirely lacking in the absence of such an ordinance". But in view of the present rapid development of this country, bringing with it a constant shift of population from one centre to another and particularly to less congested areas, municipal restrictive by-laws and the statutory provisions governing them (one has only to look at the amendments to The Municipal Act in the last three years to see this), are on the increase, with the result that the publicity given such by-laws nowadays is a totally different consideration from what it was then, in 1895. Moreover, it must be assumed that the Legislature was cognizant of this fact, and, in my opinion, that was the reason, or one of the important reasons, why in 1910 "instrument" was made to include a "municipal by-law".

And I think it is of importance to note that when the *Lindsey* and *Jarvis* cases were decided, "land", by The Registry Act, R.S.O. 1887, c. 114, s. 2(2), included "lands, tenements, hereditaments, appurtenances and real estate", whereas "land" by s. 2(e) of 1910, c. 60, and by s. 1(e) of the present revised statute is defined to include "any estate or interest" in lands. In the result an instrument that "affects land" in the language of s. 74(1) is one that affects "any estate or interest therein".

It seems rather idle to enquire into what may be said to amount to an estate or interest in land, but in *Re Rowan and Eaton*, 59 O.L.R. 379 at 384, [1926] 4 D.L.R. 582, affirmed 60 O.L.R. 245, [1927] 2 D.L.R. 722, Orde J.A. approved of the proposition stated in Williams on Vendor and Purchaser, 3rd ed. 1922, at p. 467 (see 4th ed. 1936, p. 531), that "the fact that any land purchased is subject to restrictive covenants is such a defect in title as justifies the purchaser in refusing to perform the contract". The learned author at the same page adds: "And *a fortiori*, any statutory restriction on the use of land furnishes a like objection to the title." He cites *Bird v. Eggleton* (1885), 29 Ch. D. 1012; *In re Ponsford and Newport School Board*, [1894] 1 Ch. 454, and *In re Bosworth and Corporation of Gravesend*, [1905] 1 K.B. 403, affirmed [1905] 2 K.B. 426, which amply bear him out. See also *In re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379; *Delbridge v. Township of Brantford* (1917), 40 O.L.R.

443 at 447, 38 D.L.R. 677, and *Re W. J. Blainey Ltd. and The City of Toronto*, [1935] O.R. 476, [1935] 4 D.L.R. 328. In the latter case Mr. Justice Hope stated at p. 477: "Clearly a municipal by-law may affect the rights of a person with regard to the use of property".

In *Grimshaw v. City of Toronto* (1913), 28 O.L.R. 512 at 514, 13 D.L.R. 247, Middleton J., as he then was, said after remarking that an "instrument" now included a municipal by-law: "Under an expropriation by-law, the municipality certainly acquire some right; and failure to register such a by-law would enable the owner of the land to convey to a *bona fide* purchaser pending the arbitration, and thus defraud the purchaser. I can see nothing to prevent the registration or to render it unlawful, nor can I see anything improper in the registration; while the failure to record the by-law would, in my opinion, be most objectionable and likely to lead to serious complications."

By a parity of reasoning I have no hesitation in concluding that by means of this restrictive by-law the plaintiff municipality "certainly acquired some right", *viz.*, the right to insist upon the use to which the defendant's land should be put. I can conceive of no higher right with respect to the land of another. Therefore, for the reasons expressed, I am satisfied that a by-law such as the one now being considered must be registered unless the municipality is prepared to run the risk of having it afterwards "adjudged fraudulent and void against a subsequent purchaser or mortgagee for valuable consideration without actual notice".

It may be suggested that if municipalities are required to register by-laws restricting the use of land they will be inconvenienced and put to rather heavy expense because these by-laws usually involve sizeable areas of land. But that consideration should not, in my opinion, be allowed to weigh against the circumstances of this case and of similar cases that may well arise in future. Since the Legislature has said, as I see it, that by-laws affecting land or any estate or interest therein are to be registered if they are intended to stand against the interest of a purchaser or a mortgagee acquired subsequently for valuable consideration and without actual notice, and the expense of registration is a factor, it is respectfully suggested that legislation might require a Registrar of Deeds or Master of Titles to



keep such a book as is now kept for the registration of municipal money by-laws.

Counsel for the defendant also attacks the validity of the by-law as amended in 1952 and there is much to be said for the view he takes of the matter. While the by-law as originally passed excepts certain kinds of buildings from its operation, it is a by-law limiting lands for residential and other purposes and its nature has not been changed by the amendment. As was stated by Sir William Mulock C.J.O. in *The City of St. Catharines v. Hulse*, [1936] O.W.N. 211 at 212, [1936] 2 D.L.R. 453, there is no statutory definition of what constitutes a residential highway, and he goes on to say that people reside in "private residences, hotels, apartment houses, boarding houses, hospitals, industrial homes, lunatic asylums, houses for the aged and blind, for children, etc.". In these days motels and tourist-homes should be added to the list and they are mentioned in the amendment of the by-law, which reads in part:

"1A. Residential shall mean a single family only living in a non-profit housing unit including domestic servants. Boarders or lodgers not exceeding two (2) in number may be permitted . . . It shall exclude tourist homes, apartments, duplexes, hotels, motels or any other type of use where the object is to obtain revenue except as provided in paragraph 1B below."

What does "a single family only living in a non-profit housing unit" mean, and what is one to understand from the exclusion of "tourist homes, apartments, duplexes, hotels, motels or any other type of use where the object is to obtain revenue"? Can I operate one or more of such types of residential accommodation if I am a philanthropist? Or if I have a single family residence or an apartment, can I not lease or rent it if my object is gain? Finally, does the right to restrict the use of property for certain purposes give a municipality the right to prohibit its use for revenue? I am not deciding, but it seems to me that the by-law or parts of it may be beyond the powers of the plaintiff municipality.

The action is dismissed with costs.

*Action dismissed with costs.*

*Solicitor for the plaintiff: D. A. McConachie, Oakville.*

*Solicitor for the defendant: Hyliard G. Chappell, Toronto.*

## [COURT OF APPEAL.]

## McGuire v. McGuire and Desordi.

*Habeas Corpus — Procuring Attendance of Witness who is Imprisoned — Habeas corpus ad testificandum — Rule 230 — Implied Limitations on Court's Power — Incapacity to Direct Writ to Person outside Ontario — The Penitentiary Act, 1939 (Can.), c. 6.*

*Courts — Territorial Jurisdiction — Absence of Jurisdiction to Issue Process into Different Province.*

The Supreme Court of Ontario has no jurisdiction to order the issue of a writ of *habeas corpus ad testificandum* directed to the warden of a penitentiary in another Province, in order to procure the attendance as a witness at a trial in Ontario of a person who is imprisoned in that penitentiary. Rule 230, providing for the issue of such a writ, must be interpreted as subject to an implied requirement that the gaoler or other person to whom the writ is directed is within the Province of Ontario. Regulation 132 of the Penitentiary Regulations, made pursuant to s. 7 of The Penitentiary Act, presupposes a valid writ or an order of a Court of competent jurisdiction, and does not give power to the Courts of one Province to require the production of a convict imprisoned in another Province.

AN APPEAL by the Attorney-General of Canada, by leave of Judson J., from an order made by Chevrier J. in chambers, directing the issue of a writ of *habeas corpus ad testificandum* to secure the attendance, as a witness at a trial in Ontario, of a prisoner confined in a penitentiary in Quebec.

4th March 1953. The appeal was heard by LAIDLAW, HOPE and J. K. MACKAY JJ.A.

[At the opening of the argument THE COURT raised the questions of the status of the appellant, and of the right of appeal, and requested argument on these questions.]

*W. R. Jackett, Q.C.*, for the Attorney-General of Canada, appellant: The writ ordered by Chevrier J. is to be directed to the warden of the penitentiary. Under s. 5(d) of The Department of Justice Act, R.S.C. 1927, c. 106, the Minister of Justice, as Attorney-General of Canada, has charge of all litigation affecting the Crown or any public department, and by s. 3 of The Penitentiary Act, 1939 (Can.), c. 6, he has control and management of all penitentiaries and matters connected with them. The notice of motion was served on the Commissioner of Penitentiaries, and I appear for the Attorney-General as representing him. By the service of the notice of motion on our official we become a "party" to the *habeas corpus* proceedings, under s. 1(n) of The Judicature Act, R.S.O. 1950, c. 190, although we are not a party to the divorce action. Once it is established that we are a party, we have a right of appeal under s. 26 of The Judicature Act.

K. G. Morden, Q.C., for the defendant spouse, respondent: We could have applied *ex parte* for this order, but we chose to give notice. No express statutory right of appeal is given to any person. Rule 493 and ss. 24 to 26 of The Judicature Act deal with appeals in classes of matters, but do not refer to persons.

[THE COURT reserved judgment on the preliminary questions, and directed that argument proceed on the merits.]

W. R. Jackett, Q.C.: The Supreme Court of Ontario has no jurisdiction to issue a writ of *habeas corpus* directed to a person in another Province. The question is solely one of territorial jurisdiction. Rule 230 contains no territorial limitation, but under the accepted rules of interpretation its effect must be limited to Ontario.

The power to make regulations, under s. 7 of The Penitentiary Act, is vested in the Commissioner of Penitentiaries. The section refers to "The Commission", but by 1947, c. 41, a single Commissioner was substituted for the Commission previously provided for in the Act. These regulations, including reg. 132, apply only to the internal management of penitentiaries, and do not extend the jurisdiction of any Court. Under ss. 51, 52 and 53 of the Act the warden of a penitentiary has a statutory duty to keep prisoners, unless some other provision intervenes.

No Court has power to issue a writ of *habeas corpus* (whether *ad subjiciendum*, *ad respondendum*, or *ad testificandum*) to take effect outside the territorial jurisdiction of the Court (which, in the case of the Supreme Court of Ontario, is coextensive with the Province): *Rex v. Pinckney*, [1904] 2 K.B. 84; *Regina v. Riel* (1885), 2 Man. R. 302; *Ex parte Stather* (1886), 25 N.B.R. 374; *Laflamme v. Renaud*, 84 C.C.C. 153, [1945] 3 D.L.R. 601.

The Supreme Court of Ontario got its jurisdiction in this respect from s. 3 of The Judicature Act, 1881 (Ont.), c. 5, which described it as "The Supreme Court for Ontario". Under s. 91(14) of The British North America Act, 1867, the competence of the provincial Legislature is restricted to matters "within the Province", and no Province has power to make laws to have effect outside its own borders: *Attorney-General for Ontario v. Reciprocal Insurers et al.*, [1924] A.C. 328, 41 C.C.C. 336, [1924] 1 D.L.R. 789, [1924] 2 W.W.R. 397.

[LAIDLAW J.A.: Your argument is predicated upon the assumption that the jurisdiction of the Court is statutory, but



jurisdiction to issue writs of *habeas corpus* is a common law jurisdiction: *Regina v. Townsend* (1857), 3 U.C.L.J. 184.] The Supreme Court of Ontario was created by statute and its jurisdiction is derived from the statute. [LAIDLAW J.A.: The Judiciary Act merely consolidated the common law Courts, which had inherent powers. They did not lose those powers by the Act.] It was the statute that gave the Supreme Court of Ontario the powers formerly possessed by the other Courts. Its jurisdiction is defined by legislation of the Province, and is limited to the Province—its jurisdiction cannot be greater territorially than that of the Legislature that created it.

The Courts of Ontario and Quebec may issue subpoenas to take effect in either Province, but this power, found in ss. 4 to 11 and 13 of an Act respecting the Appointment of Commissioners for taking Affidavits and the Attendance of Witnesses in the Courts of Upper and Lower Canada, reciprocally, C.S.C. 1859, c. 79, reprinted in R.S.O. 1950, vol. 1, pp. 1300-1, is derived from a pre-Confederation statute that has never been repealed. There is reciprocal legislation with other Provinces, but it is limited in its application, as in The Reciprocal Enforcement of Judgments Act, R.S.O. 1950, c. 333. One apparent exception to the general rule is the right to permit service of a writ of summons outside Ontario, but that is not really extraterritorial legislation: *Standard Construction Co. v. Wallberg* (1910), 20 O.L.R. 646 at 649; *Deacon v. Chadwick* (1901), 1 O.L.R. 346 at 351.

*K. G. Morden, Q.C.*: This question should be considered from the point of view of the litigant. It is true that we might have examined Desordi on commission, but in contested divorce actions commission evidence is unsatisfactory: *D. v. D.* (1931), 40 O.W.N. 457.

Rule 230 and the Penitentiary Regulations, when read together, justify the issue of this writ. In the cases cited for the appellant there was no complementary legislation or ancillary jurisdiction.

Federal and provincial legislation together must cover the whole of Canada: *Attorney-General for Ontario et al. v. Attorney-General for Canada et al.*, [1947] A.C. 127, [1947] 1 All E.R. 137, [1947] 1 D.L.R. 801, [1947] 1 W.W.R. 305. It is possible to have complementary legislation between Ontario and the federal authorities, and although this man is actually in Quebec he is still under the federal authority and control; he

is not subject to the jurisdiction of the Government of Quebec. If the institution were a provincial prison the position would be entirely different, but he is confined in a federal institution. Prisoners sentenced at Port Arthur are imprisoned in the penitentiary in Manitoba, and surely the Court that sentences a man must have power to bring him before it.

Under s. 91(28) of The British North America Act, 1867, the control and management of penitentiaries is given to the Dominion. Jurisdiction may be created by reciprocal legislation of the Dominion and the Provinces: *Gold Seal Limited v. Dominion Express Company*, 62 S.C.R. 424 at 466, 62 D.L.R. 62, [1921] 3 W.W.R. 710. There is such reciprocal legislation in Rule 230 and the Penitentiary Regulations, which have statutory authority.

The reference in reg. 132(a) (ii) of the Penitentiary Regulations to a "court of competent jurisdiction" must mean a Court having jurisdiction over the subject-matter of the action: *Rex v. Garrett et al.*, [1907] 1 K.B. 881 at 886.

Alternatively, in all matters over which the Parliament of Canada has legislative authority, the Court in which they are heard is a Dominion Court, and by the operation of ss. 2 and 35 of The Canada Evidence Act, R.S.C. 1927, c. 59, provincial laws of evidence (which would include the power to grant a writ of *habeas corpus ad testificandum* under Rule 230) are made applicable. This action, being one for divorce, is within that category: *Re Solloway, Mills and Co. Ltd.; Ex parte Solloway*, [1937] O.W.N. 450, [1937] 4 D.L.R. 27, 19 C.B.R. 1; *Valin v. Langlois* (1879), 3 S.C.R. 1; *Regina v. Fox et al.* (1899), 18 P.R. 343.

In the further alternative, while it is true that process cannot issue where it cannot be enforced, there is no practical difficulty about enforcement in this case, since the Commissioner of Penitentiaries is a federal officer, and is within Ontario, and the warden of the penitentiary is his subordinate and subject to his orders.

*W. R. Jackett, Q.C.*, in reply: There is no complementary legislation here, and s. 7 of The Penitentiary Act does not authorize the extension of the jurisdiction of a provincial Court.

While the judges of a provincial Court are federal appointees, this does not make the Courts federal Courts, although the

Parliament of Canada can confer jurisdiction on the judges of a provincial Court: *Valin v. Langlois* (1879), 5 App. Cas. 115. In *Attorney-General for Ontario et al. v. Attorney-General for Canada et al.*, *supra*, it was pointed out that in every case some points arise that are federal matters and some that are provincial.

As to the respondent's third submission, the mere fact that a Court knows that its order will be obeyed does not give it jurisdiction.

*Cur. adv. vult.*

23rd March 1953. The judgment of the Court was delivered by

LIDLAW J.A.: In an action for divorce the defendant spouse made an application in chambers for an order that a writ of *habeas corpus ad testificandum* should issue for the purpose of bringing her co-defendant, who was then in prison outside of Ontario, before the judge presiding at the trial of the action at the sittings of the Court in Ottawa, to give evidence on her behalf. Counsel for the Attorney General of Canada appeared on the application and was heard in opposition to it. Mr. Justice Chevrier allowed the motion and made an order, dated the 23rd January 1953, in the following form and terms:

"1. IT IS ORDERED that a Writ of Habeas Corpus ad Testificandum do issue out of this Court directed to the Warden of St. Vincent de Paul Penitentiary at Montreal, in the Province of Quebec, to bring Jules Desordi (sometimes known as Jules Desorcy), presently detained at the said penitentiary, before the judge presiding at the sittings of this court for the trial of actions to be holden at the City of Ottawa, in the County of Carleton, on the 12th day of January, 1953, at the hour of 11 o'clock in the forenoon and so from day to day until the above action is tried to give evidence on behalf of the defendant Emma Johanna Brown McGuire."

The Attorney-General of Canada applied to Mr. Justice Judson for leave to appeal to this Court, and leave was granted by order dated the 6th February 1953.

When the appeal came on for hearing the Court raised the question of the right of the Attorney General of Canada to participate in the proceedings in the Court below, and also the



question whether there was a right of appeal to this Court from the order made by Mr. Justice Chevrier in chambers. After hearing argument on the points raised, the Court reserved its judgment in respect of them and proceeded to hear the appeal.

I observe at once that the notice of motion for the order in question was directed to "Commissioner of Penitentiaries, Department of Justice, Wellington Street, Ottawa, Ontario", and bears a notation thereon, "Served at 3.30 p.m. January 22/52." By s. 3 of The Penitentiary Act, 1939 (Can.), c. 6, the Minister of Justice has "the control and management of all penitentiaries and all prisoners and other persons confined therein and inmates thereof and over all matters connected therewith". The Attorney General of Canada has "the regulation and control of all litigation for or against the Crown or any public department, in respect of any subject within the authority or jurisdiction of Canada": The Department of Justice Act, R.S.C. 1927, c. 106, s. 5(*d*).

The motion made by the respondent was plainly a matter connected with the control and management of St. Vincent de Paul Penitentiary at Montreal and a person confined therein, and therefore the Minister of Justice and Attorney General of Canada was charged with a duty and responsibility in respect thereof. It was the duty of the Attorney General of Canada to do what he deemed advisable and necessary on behalf of the Department of Justice in the proceeding commenced by the respondent. He appeared on the motion and therefore, by virtue of s. 1(*n*) of The Judicature Act, R.S.O. 1950, c. 190, must be regarded as a party in the proceedings, although not named in the record. Counsel then relies upon ss. 25 and 26 of The Judicature Act, as authority for the right to appeal to this Court from the order made by Chevrier J. Apparently counsel regarded that order as interlocutory and not as final. Therefore, leave was sought and was granted pursuant to s. 25 of The Judicature Act and the relevant Rules of Practice. I have much reason to doubt the correctness of that view. I think that as between the respondent and the Minister of Justice or the warden of the penitentiary, the order was final in nature: see *Guaranty Trust Company of Canada v. Fleming and Talbot*, [1946] O.R. 817, [1947] 1 D.L.R. 184. But even so, the case falls within s. 26(1) (*b*) of The Judicature Act, and an appeal lies to this Court.

Counsel for the Attorney General of Canada objects to the order in appeal on the ground that it is a nullity. He argues that the Supreme Court of Ontario has no jurisdiction to order a writ of *habeas corpus ad testificandum* to issue to a person outside Ontario to bring a person who is in custody outside Ontario before a Court in Ontario. The British North America Act gives to the Provinces legislative power in respect of the classes of subjects enumerated in s. 92, among which are "Property and Civil Rights in the Province" and "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts". But no provincial Legislature has any power to pass laws having any operation outside its own territory and no tribunal established by provincial legislation can extend its process beyond its own territory so as to subject either persons or property to its decisions.

In *Deacon v. Chadwick* (1901), 1 O.L.R. 346 at 351, Armour C.J.O. quoted Story on Conflict of Laws, 8th ed., s. 539, as follows: "Every exertion of authority of this sort beyond this limit is a mere nullity and incapable of binding such persons or property in any other tribunals."

Approval was given by the learned Chief Justice to a statement in a decision (*Pennoyer v. Neff* (1877), 95 U.S. 714 at 727) in a Court in the United States, which he thought "equally applicable to the Provinces of the Dominion as to the States of the Union", that: "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them."

In *Re Tangye and Smith Ltd. v. The Pelican Carbon Company of Canada*, [1935] O.R. 123 at 125, [1935] 1 D.L.R. 759, Kerwin J. referred to *Deacon v. Chadwick*, *supra*, and to *Schibsby v. Westenholz et al.* (1870), L.R. 6 Q.B. 155; *Sirdar Gurdial Singh v. The Rajah of Faridkote*, [1894] A.C. 670, and 6 Halsbury, 2nd ed. 1932, para. 384, p. 329. I refer also to *McFarlane v. Derbishire* (1851), 8 U.C.Q.B. 12; *Re Maugham* (1874), 22 W.R. 748; *Beaty v. Cromwell* (1883), 9 P.R. 547; *Weldon v. Gounod* (1885), 15 Q.B.D. 622; *In re Busfield*; *Whaley v. Busfield* (1886), 32 Ch. D. 123; *Re Benfield v. Stevens et al.* (1897), 17 P.R. 339;

*Richer v. Borden Farm Products Co. Limited* (1921), 59 O.L.R. 172, 64 D.L.R. 70.

The Legislature of this Province has not attempted to give jurisdiction to the Courts of this Province over persons outside its territorial jurisdiction, and there is no statutory power in those Courts to make the order in question.

It has been held that the power to order the issue of a writ of *habeas corpus ad testificandum* existed in the Courts at common law apart from statutes: see *Rex v. Burbage* (1763), 3 Burr. 1440, 97 E.R. 916; *Re Price* (1804), 4 East 587, 102 E.R. 956; *Regina v. Townsend* (1857), 3 U.C.L.J. 184; *Spellman v. Spellman* (1889), 10 C.L.T. 20 and Harrison's Common Law Procedure Act, 2nd ed. 1870, p. 257, note (y). But at common law no Court had any jurisdiction or powers over persons outside the territorial jurisdiction of the Court. A writ of *habeas corpus* could not be issued to such a person: *Rex v. Pinckney*, [1904] 2 K.B. 84. I have read also the following cases referred to by counsel for the appellant: *Regina v. Riel* (1885), 2 Man. R. 302; *Ex parte Stather* (1826), 25 N.B.R. 374; *Laflamme v. Renaud*, 84 C.C.C. 153 at 159, [1945] 3 D.L.R. 601.

Counsel for the appellant, in his statement of law and fact, submitted, and I accept his statement as correct, that: "When . . . Rule 230 of the Rules of Practice and Procedure authorizes the Supreme Court of Ontario to issue a Writ of Habeas Corpus *ad testificandum* directed to the gaoler or other person having custody of a prisoner, the Rule must be interpreted as being subject to an implied requirement that the gaoler or other officer to whom the Writ is to be directed is within the Province of Ontario."

It remains only to mention briefly two points of argument presented by counsel for the respondent. He endeavoured to invoke reg. 132 of the Penitentiary Regulations authorized by the Minister of Justice pursuant to s. 7 of The Penitentiary Act. That regulation provides, in part, that:

"A convict shall be produced for the purpose of . . .

"(ii) testifying at trial or any examination authorized by rules of Court in civil proceedings in compliance with a Writ of Habeas Corpus *ad testificandum* or the order of a court of competent jurisdiction."

But that regulation presupposes a valid writ of *habeas corpus ad testificandum* or an order of a Court of competent jurisdic-



tion. It does not give any force or validity to a writ of *habeas corpus ad testificandum* issued without authority and which, in law, is a nullity. It does not give any power to the Courts of one Province to require the production of a convict who is imprisoned in another Province.

Then counsel argued that as the action in which the order in appeal was made is for divorce, The Canada Evidence Act, R.S.C. 1927, c. 59, and all relevant Dominion legislation, including The Penitentiary Act and the regulations thereunder, are applicable. But again, nothing can be found in that legislation or in the regulations which empowers a Court constituted under provincial legislation to make an order of the kind in appeal. In the absence of such power the order is a nullity.

The appeal must be allowed and the order made by Mr. Justice Chevrier in chambers must be set aside. In place thereof the order should be that the motion be dismissed. There should be no costs in this Court or in the Court below.

*Appeal allowed without costs.*

*Solicitor for the Attorney General of Canada, appellant:*  
*F. P. Varcoe, Ottawa.*

*Solicitors for the defendant McGuire, respondent:* *Hughes & Laishley, Ottawa.*

*Solicitors for the plaintiff:* *Lieff & Lieff, Ottawa.*

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[COURT OF APPEAL.]

**Regina v. Groulx and Nevers.**

*Criminal Law — Appeals — Duty of Court of Appeal — Verdict to be Quashed if not Supportable on Evidence — The Criminal Code, R.S.C. 1927, c. 36, s. 1014(1) (a) — Evidence wholly Circumstantial.*

The effect of s. 1014(1)(a) of The Criminal Code is that the jury must decide on the evidence and according to the evidence, and if it does not do so it is the duty of the Court of Appeal to set the verdict aside. The jury must be governed by the evidence, excluding everything and anything that is not evidence, and the Court of Appeal is given the statutory duty of examining the evidence with care to determine whether or not the jury has done this, and is charged with the responsibility, as the statutory judge of both fact and law, of setting aside a conviction if the evidence is such that it is unreasonable or unsafe to convict on it. *Regina v. Boyd*, [1953] O.R. 215, and other authorities, applied.

*Evidence — Comment on Accused's Failure to Testify — Effect of Prohibited Comment — Absence of Discretion in Court — The Canada Evidence Act, R.S.C. 1927, c. 59, s. 4(5).*

A comment by the trial judge on the failure of the accused to testify, within the prohibition of s. 4(5) of The Canada Evidence Act, is fatal to a conviction, and the Court of Appeal has no discretion permitting it to dismiss the appeal if it is of the opinion that the comment could not have affected the result. *Rex v. McNulty and Courtney*, [1948] O.W.N. 827, followed. It is immaterial that the trial judge made the comment on a collateral issue, and did not intend to direct the jury's mind to the fact that the accused did not give evidence, since the decisive matter is not what the judge intended but what his words would convey to the minds of the jury. *Bigaouette v. The King*, [1927] S.C.R. 112 at 114; *Rex v. Gallagher* (1922), 17 Alta. L.R. 519 at 520, applied; *Rex v. Zicari et al.* (1936), 65 C.C.C. 386; *Rex v. Hill* (1903), 36 N.S.R. 253, referred to.

APPEALS on questions of law, and applications for leave to appeal on questions of fact, from the conviction of both appellants of murder, before Kelly J. and a jury.

11th March 1953. The appeals and applications were heard by PICKUP C.J.O. and LAIDLAW, HOPE, J. K. MACKAY and F. G. MACKAY JJ.A.

*C. T. Murphy*, for the accused Nevers, appellant: There was not sufficient evidence to justify a finding that Nevers came within s. 69(2) of The Criminal Code, R.S.C. 1927, c. 36, and could be convicted on the basis of a common intention with Groulx. The only place in which such evidence could possibly be found is in the statement made by Nevers to the police, and that statement should not have been admitted as voluntary because: (a) the accused was in custody on a "nominal" charge of vagrancy, an offence of which he was clearly not guilty: *Rex v. Dick*, [1947] O.R. 105, 87 C.C.C. 101, 2 C.R. 417, [1947] 2 D.L.R. 213; (b) the form of the caution given by the police

officer ("you may be charged with murder") was such as to constitute an inducement in itself: *Rex v. Murakami*, [1951] S.C.R. 801 at 802, 100 C.C.C. 177, 12 C.R. 213, [1951] 4 D.L.R. 370; (c) the statement was elicited by questioning that was virtually cross-examination.

Even if the statement was properly admitted it contains nothing from which a jury could be satisfied beyond a reasonable doubt that Nevers did any act that resulted in the death of Hargis. Where the evidence does not show which of two accused persons committed a crime, and there is no evidence of common intention, both accused must be acquitted: *Rex v. Upton* (1915), 9 O.W.N. 74, 25 C.C.C. 28, 26 D.L.R. 208; *Rex v. Richardson et al.* (1785), 1 Leach 387, 168 E.R. 296; Phipson on Evidence, 9th ed. 1952, p. 99.

[Counsel was instructed by the Court that he need not at this stage argue any ground of appeal that would lead only to the ordering of a new trial.]

*D. M. Lawson*, for the accused Groulx, appellant: My submission is similar to that just made. Basically, I ask that the conviction be set aside as against the weight of evidence.

1. There is no evidence of common intention, or of any association between the two accused before Hargis's death.

2. Groulx's statements to the police should not have been admitted. All three statements were made in 1950, when a charge of breaking and entering was pending against Groulx, and the hope of favour may well have been in his mind at that time. None of the statements was signed; had they been truly voluntary he would surely have been asked to sign them, or at least, being illiterate, to make his mark. The statements were not read to the jury by the inspector who took them; they were filed as exhibits, and were then read by Crown counsel.

3. The jury could have convicted only if they found that there was a common intention, but my submission is that s. 69(2), which refers to "several" persons, does not apply where there are only two. Parliament could have said "two or more", as it did in, *e.g.*, ss. 5(2) and 15. The word "several" has been held in American cases to mean "more than two".

*W. B. Common, Q.C.*, for the Attorney-General, respondent: The trial judge's remarks as to the accused's not having gone into the witness-box do not constitute a comment such as is prohibited by s. 4(5) of The Canada Evidence Act. They were



made while the trial judge was charging the jury as to the onus on the Crown, and in that connection he pointed out that the only evidence was in the extra-judicial statements, unsworn, put forward by the Crown. He was pointing out the weakness of the Crown's case. He did not deal with the theory of the defence until some pages later in his charge. The remark was not a comment on the accused's failure to testify in their own defence. I rely on *Rex v. Darlyn*, [1947] 2 W.W.R. 872, 90 C.C.C. 142, 4 C.R. 366, [1948] 1 D.L.R. 203. It is true that the *Darlyn* case was not followed in *Rex v. McNulty and Courtney*, [1948] O.W.N. 827, but there the comment was directly on the accused's failure to testify in support of his own defence.

[PICKUP C.J.O.: We are all of the opinion, notwithstanding your argument, that this remark by the trial judge was fatal, and that the conviction cannot stand. Please address us as to whether there should be a new trial or an acquittal.]

There is evidence in Nevers's statement that, taken with other circumstantial evidence, would support a conviction quite apart from s. 69(2). It is true that, to bring the case within s. 69(2), evidence of other break-ins was given, to establish a joint enterprise in respect of Hargis's cabin. But in my submission there is, wholly apart from the evidence of other break-ins, evidence of a common intention. It is clear from evidence admissible against Nevers that when the accused approached Hargis's cabin they were armed, and there is evidence that they were both subsequently in possession of goods stolen from Hargis's cabin. Surely this justifies an inference of a common intention, *viz.*, an intention to rob Hargis while armed, of which the killing of Hargis was a natural consequence.

There is no authority in Canada for the submission that "several" in s. 69(2) means "more than two", and the subsection has been repeatedly applied to only two; "several" must surely be synonymous with "two or more".

Nevers's statement was properly admitted. The warning was not with respect to the charge of vagrancy, but expressly referred to a possible charge of murder, thus making *Rex v. Dick*, *supra*, clearly distinguishable. *Boudreau v. The King*, [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81, and a whole line of cases show that the mere fact of questioning

by the police does not make a statement inadmissible, and there is no suggestion in the evidence of any pressure or inducement, apart from the mere fact of arrest. There is no more inducement in saying "you may be charged with murder" than in saying "you are charged with murder".

*Rex v. Upton, supra*, is of very little assistance, since the facts are not set out in the report.

As to Groulx there is ample evidence when his admissions are coupled with other evidence, particularly his admission that he was in possession of the gun from which, according to other evidence, shots were fired into Hargis's body.

Groulx's statements were properly admitted in evidence. They were completely exculpatory, so far as the crime of homicide was concerned, and there is nothing in the evidence on the *voir dire* to indicate that they were not voluntary. The practice adopted in reading the statements to the jury is not objectionable, although it would probably be better if the officer who took the statement were the one to read it to the jury.

*C. T. Murphy*, in reply, referred, in connection with the ordering of an acquittal rather than a new trial, to *Rex v. Derby* (1924), 42 C.C.C. 152; Tremear's Annotated Criminal Code, 5th ed. 1944, p. 1303.

*D. M. Lawson*, in reply: The only evidence against Groulx is what the police had in 1950, at which time they considered it insufficient and released him. As to the meaning of "several" I refer to Craies on Statute Law, 4th ed. 1936, pp. 68-9, as to giving to the words of a statute their plan ordinary meaning, particularly the quotation from *Warburton v. Loveland* (1831), 2 Dow & Cl. 480 at 489, 6 E.R. 806. The ordinary, everyday meaning of "several" is more than two.

*Cur. adv. vult.*

24th March 1953. The judgment of the Court was delivered by

J. K. MACKAY J.A.:—An appeal by George Groulx and his co-accused Glen Nevers from their conviction for the murder of John Hargis on or about the 25th October 1948, after a trial before Mr. Justice Kelly and a jury at Sault Ste. Marie on the 23rd January 1953.

The respective notices of appeal are practically the same in form and substance and set forth many grounds of appeal, among which are the following:

(a) The conviction is against the weight of evidence and is contrary to law.

(b) There was no evidence to show any design or agreement between accused and co-accused to commit any unlawful act at the camp of John Hargis.

(c) The learned trial judge commented on the failure of the accused and the co-accused to testify.

At p. 396, l. 23 of the transcript of evidence the learned trial judge in his charge to the jury said: "So that even if you decide that you cannot accept the evidence of the accused—and that evidence is only statements put before you—neither one took the witness-stand—you must consider the evidence adduced by the Crown. . . ."

The Canada Evidence Act, R.S.C. 1927, c. 59, s. 4(5), is as follows: "The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution."

Counsel for the Crown submitted that the foregoing reference to the accused not taking the witness-stand was, in the circumstances, a wholly collateral matter and could have had no effect on the trial, and moreover that the intention of the judge was not to direct the minds of the jury to that fact.

In *Bigaouette v. The King*, [1927] S.C.R. 112 at 114, 47 C.C.C. 271 at 272, [1927] 1 D.L.R. 1147, Duff J. (as he then was) quoted with approval the law as stated by Stuart J.A. in *Rex v. Gallagher*, 17 Alta. L.R. 519 at 520, 37 C.C.C. 83, [1922] 1 W.W.R. 1183, 63 D.L.R. 629, in these words: ". . . it is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal."

See also *Rex v. Zicari et al.*, 65 C.C.C. 386, [1936] 2 D.L.R. 542, where the trial judge made such a comment, and *Rex v. Hill* (1903), 36 N.S.R. 253, 7 C.C.C. 38.



In *Rex v. McNulty and Courtney*, [1948] O.W.N. 827 at 828, Robertson C.J.O., delivering the judgment of the Court, said that a comment prohibited under s. 4(5) of The Canada Evidence Act was fatal to the conviction. If the Court had had a discretion, it would probably have said that in its opinion the result was not affected by the comment, but the statute had always been applied as an arbitrary rule, leaving no discretion to the Court.

It is clear, therefore, that the conviction of Groulx and Nevers must be set aside on this ground of appeal alone.

The appellants say that they are entitled in law to have their respective convictions quashed and a verdict of acquittal entered, inasmuch as there is no evidence on which a jury could reasonably convict them individually or as having acted in concert with anyone who did kill and murder John Hargis.

On or about the 25th October 1948 John Hargis, a retired locomotive engineer aged 67, was shot and killed at his summer cabin in township 63 in the district of Algoma, approximately 3 miles west of the village of Amyot, which village is situate on the main line of the Canadian Pacific Railway.

The camp of the late John Hargis was situate on Trout Lake, approximately 25 yards from the shore. Directly east of it and 100 yards distant was a cabin owned by one Mrs. Godfrey, 60 yards further east was another cabin owned by Mrs. Godfrey and distant yet another 200 yards was a third cabin owned by Mrs. Godfrey. Directly south of this third cabin and across the railway-tracks was a fourth cabin on a lake known as Friendly Lake. These four cabins were used in the summer and were ordinarily closed at the end of September. There was no one living in any of these cabins in the month of October 1948, with the exception of the cabin of Hargis.

The case for the Crown is, in the words of the learned trial judge, almost all circumstantial.

It is, I think, desirable that I should review some of the relevant facts as disclosed by the evidence.

The deceased John Hargis was seen alive by one Carl Lehtinen and one McQuown on the morning of 25th October 1948. On the evening of that day, at 7.40 p.m., W. J. Davis, a conductor on the Canadian Pacific Railway, noticed from his train a fire in the cabin of John Hargis. When the train reached Amyot

Davis advised the telegraph operator, Mr. McQuown, of the fire. Within an hour McQuown and one Johnston arrived at the camp and found it largely consumed by flames. Unable to find Hargis they poked in the ashes and found charred remains which later were identified as the body of John Hargis. The body was lying in an angle between the stove and the sink in what had been the living-room of the camp. They notified the authorities and one Constable Hyvonen made an investigation of the ruins of the cabin. He, Hyvonen, found the barrel of a .22 rifle lying inside the ruins as well as what appeared to be two shot-gun barrels with spent cartridges in both barrels. One Clifton testified that in September 1948 he had lent John Hargis a double-barrel 12-gauge shot-gun that had not been returned.

On the morning of 28th October 1948 Carl Lehtinen, who is a C.P.R. section foreman, and two of his employees conducted a search of the ruins and of the surrounding area. Outside the camp and approximately 75 feet to the west along a path leading to the tracks they found an empty flour-canister (ex. 19) which came from the Hargis camp. In the afternoon Lehtinen and Constable Lapp proceeded approximately  $1\frac{1}{2}$  miles east of the Hargis camp along the railway-tracks to a rock-cut where there was found a fruit-dish (ex. 23) from the Hargis camp, together with two empty sardine-tins (exs. 24 and 25), an empty orange-juice tin (ex. 26), an empty tomato-juice tin (ex. 27), an empty honey carton (ex. 28), a punctured pillow-case with flour in it (ex. 30), a jack-knife (ex. 33) and a broken dish (ex. 34). They also noted a trail of flour commencing one mile east of the Hargis camp and ending at the rock-cut where the above-described articles were found. Inside the camp Lehtinen and his companion found two shot-gun barrels, together with joining-piece (ex. 21) and a .22 rifle barrel (ex. 20). Inside the .22 rifle barrel was a discharged .22 shell-case (ex. 10) and there were also shell-cases in each of the shot-gun barrels. One shell (ex. 8) appeared to have been exploded by heat.

On the Friday after the fire, 29th October 1948, McQuown, Lehtinen, Lapp and two other men again examined the burned camp and surrounding district. They found the breech-assembly of a double-barrel 12-gauge shot-gun with the left firing-pin missing (ex. 7). This was found 10 or 12 feet away from the door of the camp. They also found a discharged shot-gun shell

(ex. 9) about 10 feet off the trail between the Hargis camp and the railway-tracks and approximately 20 yards to the rear of the camp.

On 28th October 1948 Dr. Pentland conducted an autopsy on the remains of John Hargis. Death was caused by haemorrhage from a bullet that ruptured a large blood-vessel near the heart. The remains of John Hargis were taken to Toronto for further examination by Dr. Robinson and Dr. Brown. The x-ray showed a scattering of white dots over the chest and a large shadow approximately  $\frac{1}{4}$ -inch long. A lateral view indicated that most of the dots were to the front of the body. On further examination a lead pellet was found embedded in the collar-bone. Other pellets (ex. 1) were found in the front of the lung and one in the front surface of the muscle of the heart and others in the liver and surrounding flesh. The doctors also noticed a hole approximately  $\frac{9}{16}$ -inch wide in the back wall of the left side of the chest. This hole corresponded with the larger dark shadow on the x-ray.

After further examination a .22-calibre bullet (ex. 2) was found. The path of the bullet through the lung indicated that it had passed through a large blood-vessel, thus accounting for a large amount of clotted blood in the chest cavity.

The .22-calibre rifle barrel (ex. 20), cartridge-case (ex. 10), two shot-gun barrels (ex. 21), two metallic bases of shot-gun shells, one of which was still in the barrel (exs. 21 and 22), and a discharged 12-gauge shot-gun shell (ex. 9), all of which were found in the ruins of the Hargis cabin or in the immediate vicinity, were handed over to Sergeant Sutherland, together with the .22 rifle-bullet (ex. 2). Sergeant Sutherland is a ballistician in Ottawa and his tests resulted in his concluding as follows:

1. The .22 bullet (ex. 2) was fired from a weapon that was rifled to the same specifications as the .22 barrel (ex. 20).

2. The firing-pin impression on the .22 cartridge-case (ex. 10) was similar to impressions made on similar cases by the .22 barrel.

3. Sergeant Sutherland could not say whether the firing-pin impression on fired shot-shell base (ex. 22) was the result of normal firing or of heat action.

4. The shot-shell case (ex. 9) was fired by the right hand firing-pin of the breech-works and action.



5. The shot-shell base (ex. 8) was of no identification value.

6. Sergeant Sutherland also stated that the spread of pellets shown in the x-ray photograph (ex. 17) indicated to him that the gun would have to be beyond 5 yards from the body at the time it was fired and that a .22-calibre rifle is capable of completely penetrating a human chest or head from a distance of 10 to 20 yards.

One Walter Midkiff testified that his cabin, approximately 5 miles west of Hargis's camp, was broken into between the end of August 1948 and the 8th October 1948. From it was stolen an old-type double-barrel shot-gun with scrollwork on the breech-works and the left firing-pin missing. Some foodstuffs, canned goods and a can-opener were also taken from the cabin of Midkiff during that time. Midkiff identified ex. 7 as being part of the shot-gun that was stolen, ex. 11 as being food-packages similar to those stolen, and ex. 12 as the can-opener that was stolen.

There was evidence, also, that a canoe and some blankets were stolen from a camp owned by Mr. Clifton and situated approximately two miles east of Midkiff's camp. A canoe was recovered by Constable Roddis on 30th October 1948 at a place called Birch at mileage 114 on the Canadian Pacific Railway, and in the same area Constable Hyvonen found exs. 11 and 12 which were identified by Midkiff.

George Groulx was taken into custody in October 1950, and at that time, 4th October 1950, he gave Inspector Neil of the Ontario Provincial Police a statement (ex. 41) concerning the death of Hargis, wherein he admitted being in the area at the time, and implicated another party whom he called "Johnnie". A further statement (ex. 42) was taken by Inspector Neil from Groulx on 5th October 1950, and still another statement (ex. 43) on 6th October 1950. These statements, largely exculpatory but in some minor aspects identifying articles which may have been in the Hargis cabin, were held admissible by the learned trial judge.

In the statement of the appellant Groulx taken on 6th October 1950 this appellant, an Indian, who is completely illiterate, and who, according to Inspector Neil, has practically no memory, was asked 160 questions by the inspector. Most of these questions were leading and not a few were cross-examination.

In *Rex v. Winkel et al.* (1911), 77 J.P. 191 at 192, Avory J. said to a police sergeant: "Yes, but when he said 'I have never given her any money,' you did question him, because you said, 'It is alleged you gave her £5.' That is a form of cross-examination. You have no right to cross-examine a man after you have arrested him." Later he said: "To say, 'It is alleged so and so' is only a subtle form of cross-examination."

There is no lack of authority to the effect that questioning by the police, if properly conducted, and after warning duly given will not *per se* render a statement inadmissible. Indeed, if the statement is taken under such conditions no objection properly can be taken. The burden of establishing its voluntary character always rests with the Crown. In this case, however, it is not necessary to decide whether the statements of the appellants were properly admitted in evidence.

In December 1952 two employees of the McFadden Lumber Company heard the appellant Groulx accuse the appellant Nevers of shooting the old man at Amyot. This accusation took place in a McFadden Lumber Company camp approximately 55 miles north of Blind River, Ontario. The accusation was hotly denied by the appellant Nevers. The Ontario Provincial Police were called and notwithstanding the fact that the two accused were employed and had been so employed for some time, they were taken into custody by Provincial Constable Pratt on 9th December 1952, charged with vagrancy. They were brought before Magistrate Peterson at Blind River on 10th December 1952 and remanded for eight days on the charge. On 11th December 1952 both accused were taken to Sudbury by Sergeant Crawford and on 12th December 1952 the appellant Nevers was taken from his cell to the Court House in Sudbury where he gave a statement to Inspector Neil.

The statements of both appellants were highly exculpatory in character. The statement of the appellant Groulx inculcates one "Johnnie", whom he describes as 5 feet 11 inches tall, French, and coming from Gaspé. It is well to note in passing that the appellant Nevers is 5 feet 7 inches tall, English, and comes from New Brunswick. The statement of the appellant Nevers (ex. 44) tends to connect the appellant Groulx with the commission of the crime.

The respective statements are, of course, not evidence against anyone but the person making them and it is the duty of the trial judge, a duty attempted with diligence in the present instance, to warn the jury not to pay the slightest attention to a statement except in so far as it goes to affect the person by whom it is made.

Proceeding on this basis, evidence can be gathered from the respective statements that both appellants were in the vicinity of the Hargis cabin at or near the time of the commission of the crime. There is evidence that they ate some canned foods and used flour taken from the cabin, and that they heard shots; that they used a canoe that was stolen, or at least taken, from a cabin some miles distant, there are fragmentary pieces of evidence referable to a gun taken from a shack somewhere in the general vicinity, and there may be some further material of evidentiary value inferentially.

Taking such evidence at its strongest, however, I am respectfully of opinion that it falls far short of establishing concerted action on the part of the appellants, necessary to bring them within the scope and purport of s. 69 of The Criminal Code, R.S.C. 1927, c. 36. On the other hand, even if there were evidence which, while not conclusive, might warrant a conclusion that one or other of the appellants committed the crime, but no evidence to enable the Court to determine by which one the offence was committed, the conviction must be quashed: per Meredith C.J.O. in *Rex v. Upton* (1915), 9 O.W.N. 74, 25 C.C.C. 28, 26 D.L.R. 208.

Under s. 1014(1)(a) of The Criminal Code it is provided that the Court of Appeal "shall allow" an appeal if it is of opinion, as I am here, "that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence". In other words, the effect of s. 1014(1)(a) is that a jury must decide on the evidence, and according to the evidence, otherwise it is the duty of the Court of Appeal to set the verdict aside. The jury must be governed by the evidence, excluding everything and anything that is not evidence, and the Court of Appeal is given the statutory duty to examine the evidence with care in order to determine whether the jury have done so.



The Court of Appeal is charged with the responsibility, as the statutory judge of fact as well as law, of setting aside convictions when the evidence is such that it is unreasonable or unsafe to convict thereon: *Rex v. Barnes* (1942), 28 Cr. App. R. 141; *Rex v. Dent* (1943), 29 Cr. App. R. 120; *Rex v. Wallace* (1931), 23 Cr. App. R. 32; *Rex v. Ferguson*, [1945] O.W.N. 1, 83 C.C.C. 23, [1945] 1 D.L.R. 767; *Rex v. Philbrook*, [1941] O.R. 352, 77 C.C.C. 26, [1942] 1 D.L.R. 627; *Rex v. Comba*, [1938] S.C.R. 396, 70 C.C.C. 205, [1938] 3 D.L.R. 719; *Rex v. McDonald* (1951), 4 W.W.R. (N.S.) 14, 101 C.C.C. 78, 13 C.R. 349; *Regina v. Boyd*, [1953] O.R. 215.

I am respectfully of opinion that the convictions of the appellants are not supported by the evidence.

I would grant leave to appeal, quash the respective convictions and, in the exercise of the discretion given to the Court of Appeal by The Criminal Code, direct, instead of a new trial, that a judgment and verdict of acquittal be entered.

*Acquittals directed.*

*Solicitor for the accused Groulx, appellant: Donald M. Lawson, Sault Ste. Marie.*

*Solicitor for the accused Nevers, appellant: C. T. Murphy, Sault Ste. Marie.*

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[McLENNAN J.]

**James et al. v. The Hydro-Electric Power Commission of Ontario.**

*Public Utilities—Powers of Provincial Power Commission—Expropriation of Land for Purposes of Commission—The Power Commission Act, R.S.O. 1950, c. 281, s. 24—The Public Works Act, R.S.O. 1950, c. 323, ss. 1(i), 13.*

Section 24(3) of The Power Commission Act has not the effect of giving to the Commission the powers of expropriation given to the Minister of Public Works by s. 13 of The Public Works Act. It has power to expropriate under s. 24(2) (a), but only with the authorization of the Lieutenant-Governor in Council, and it has no power under s. 24(3) to expropriate land without any authorization and as it deems necessary in its own judgment.

A MOTION for an interlocutory injunction, treated, by consent, as a motion for judgment.

2nd and 4th March 1953. The motion was heard by McLENNAN J. in Weekly Court at Toronto.

*J. T. Weir and J. S. Boeckh*, for the plaintiffs.

*L. E. Blackwell, Q.C.*, and *C. Carrick, Q.C.*, for the defendant.

8th April 1953. McLENNAN J.:—This is a motion by the plaintiffs for an order restraining the defendant, its servants and agents, from entering upon the lands of the plaintiffs known as 193 Rosedale Heights Drive, Toronto. The matter was argued on the 2nd March last, and on that day, for the reasons stated in the endorsement on the notice of motion, an order was made restraining the defendant, its servants and agents, from entering upon the lands of the plaintiffs until the trial or other final disposition of this action or until further order.

On the 4th March an application was made by counsel for the defendant that the order made on the 2nd March be reconsidered and that the matter be dealt with as on a motion for judgment, and, with the consent of counsel for the plaintiffs to this course, I agreed to do so, the interlocutory injunction to remain in force until the matter was disposed of.

A similar application by the plaintiffs was made before me in June 1952 and was dismissed upon the sole ground that the plaintiffs did not have the consent of the Attorney-General to bring that action, but in the new action recently commenced the plaintiffs have the consent of the Attorney-General. It was agreed by counsel that the material filed on the former motion would be considered as part of the material on the present motion.

There is no dispute about the facts and the question to be decided is whether the defendant Commission was lawfully authorized to expropriate a portion of the plaintiffs' lands and erect structures for high-tension power-lines thereon in order to transmit electrical power from the Richard L. Hearn Steam Generating Plant to the Toronto Bridgeman Station. The location of the Toronto Bridgeman Station is not disclosed in the material, nor is the distance between the generating plant and the plaintiffs' lands set out, but a statement was made during the course of the argument, about which there was no disagreement, that the plaintiffs' lands were located some miles distant from the generating plant.

From the material filed on this application it appears that subsequent to the disposition of the earlier motion representations were made by the plaintiffs through the Moore Park Rate-payers' Association to the Commission and to others that the high-tension power-lines be placed underground instead of on the structures above ground which are proposed. These representations having proved of no avail, this motion was brought.

The plaintiffs received a notice dated the 4th June 1952 from the Commission, that the Commission had expropriated the southerly 40 feet of their lands. The notice stated that the defendant "under and by virtue of The Power Commission Act, Revised Statutes of Ontario 1950, Chapter 281 and Amendments thereto and all other powers thereto it enabling has taken and expropriated in fee simple [the lands in question] . . . To be used for the construction, maintenance, and operation of works for the production of electrical power and energy and the transmission, transformation, supply, and distribution of electrical power or energy therefrom". The notice also stated that a plan of the expropriated lands had been registered in the appropriate registry office on the 30th May 1952, and gave notice that a claim for compensation must be made at the offices of the Commission within a limited time.

The statement of claim alleges that the filing of the plan in the registry office by the Commission purporting to expropriate some of the plaintiffs' lands was without lawful authority and that the plan was signed and filed without the authorization and approval of the Lieutenant-Governor in Council; that the plaintiffs have already suffered damage and that unless re-



strained the Commission will enter upon the plaintiffs' lands and make excavations and erect structures and that the plan constitutes a cloud on the plaintiffs' title. The relief claimed is an interim injunction until trial, a permanent injunction, and a declaration that the lands purported to be expropriated are not vested in the defendant. There is also a claim for damages already suffered.

The validity of the expropriation proceedings turns upon the construction of s. 24 of The Power Commission Act, R.S.O. 1950, c. 281, an order-in-council approved by the Lieutenant-Governor in Council made pursuant to s. 24, and certain sections of The Public Works Act, R.S.O. 1950, c. 232, particularly s. 13 of the latter Act.

Subsection 1 of s. 24 of The Power Commission Act and the introductory words of subs. 2 are as follows:

"24.—(1) The Lieutenant-Governor in Council may authorize the Commission at any time and from time to time, to acquire by purchase, lease, or in any other manner, or without the consent of the owner thereof to enter upon, take possession of, expropriate and use, any land, lake, river, stream or other body of water or watercourse, and temporarily or permanently to divert or alter the boundaries or course of any lake, river, stream or other body of water or watercourse, or raise or lower the level of the same or flood or overflow any land.

"(2) In particular, but without limiting the generality of subsection 1, the Lieutenant-Governor in Council, upon the recommendation of the Commission, may authorize the Commission to. . . ."

Then follow clauses lettered *a* to *n* describing in many words different powers which the Commission may be authorized to exercise, some of which contain powers of expropriation and others do not. Of these clauses it will only be necessary to refer briefly to clauses *a*, *c*, *d* and *g*,

On the 5th May 1949 the Lieutenant-Governor in Council authorized the Commission to exercise certain of the powers referred to in s. 24 by making regulations which were appended to the order-in-council. The regulations are as follows:

"1. The Commission is authorized to acquire by purchase, lease, or in any other manner, or without the consent of the owner thereof to enter upon, take possession of, expropriate and use, the land or any part thereof described in Schedule 1.

"2. In particular, but without limiting the generality of regulation 1, the Commission is authorized to,—

"(a) generate and produce electrical, pneumatic, hydraulic, mechanical or other power or energy on the lands described in Schedule 1 by the use of water, coal, steam or oil, or by any other means, and transform, transmit, make available for use, distribute, deliver, sell, supply and generally use for the purposes of the Commission the electrical, pneumatic, hydraulic, mechanical or other power or energy and connect the works constructed or installed for these purposes with any other power works and with any system;

"(b) for the purposes of clause a acquire by purchase, lease or otherwise, hold, improve and use real and personal property, acquire by purchase or otherwise water, coal, steam, oil and other supplies, and construct, maintain and operate works, including without limiting the generality of the foregoing, development works, generating plants, transformer stations, transmission lines, switching and regulating works, distribution lines, access and other roads, and all other equipment, plant and works and things required for or incidental to any such purposes; and

"(c) conduct, store, transmit, transform and supply that electrical power or energy and steam for the purposes of the Act, and with lines of wires, poles, conduits, pipes, motors, transformers or other conductors, equipment or devices, receive, conduct, convey, transmit, transform, distribute, supply or furnish such electrical power or energy and steam to or from or for any person at any place, through, over, under, along, upon or across any land, public highway or public place, stream, water, watercourse, bridge, viaduct or railway, and through, over, upon or under the land of any person."

Regulation 1 adopted in part the language of subs. 1 of s. 24. The lands described in the schedule are the lands upon which has been erected the Richard L. Hearn Steam Generating Plant located in the area of Ashbridge's Bay in the city of Toronto.

Clauses a, b and c of regulation 2 correspond substantially to clauses c, d and the last half of g respectively of s. 24(2) of The Power Commission Act.

Counsel for the Commission admitted that the order-in-council by itself did not confer on the Commission any power to expropriate the plaintiffs' lands and relied upon subs. 3 of

s. 24 of The Power Commission Act, which, he submitted, conferred on the Commission the powers of expropriation given to the Minister of Public Works by s. 13 of The Public Works Act, and he conceded that unless the powers contained in s. 13 of the latter Act were conferred on the Commission there was no lawful expropriation of the plaintiffs' lands.

Section 24(3) of The Power Commission Act reads as follows:

"In relation to all matters authorized by the Lieutenant-Governor in Council under this section, the Commission shall have and may exercise and enjoy, in addition to the powers conferred by this or any other Act, all the powers conferred upon the Minister of Public Works in relation to a public work by *The Public Works Act*, and in the application of this section, where the words 'the Minister', 'the Department' or 'the Crown' appear in that Act, they shall, where the context permits mean the Commission."

Section 13 of The Public Works Act reads as follows:

"The Minister may for and in the name of His Majesty purchase or acquire and, subject as hereinafter mentioned, may without the consent of the owner thereof enter upon, take and expropriate any land which he may deem necessary for

"(a) the public purposes of Ontario; or

"(b) the use or purposes of any Department of the Government thereof."

The plaintiffs attack the validity of the expropriation on the grounds that the powers of the Minister of Public Works under s. 13 of The Public Works Act are not included in the powers conferred on the Commission by s. 24(3) of The Power Commission Act, and that in any event s. 24(3) does not apply because there were no expropriation proceedings authorized by the order-in-council except as to the lands described in Schedule 1, and therefore there was no matter authorized within the meaning of s. 24(3) in relation to which the Commission might exercise the powers so conferred.

Before I discuss the meaning to be attributed to the statutory provision just quoted, it should be said that counsel were in agreement as to the principle of construction to be adopted in considering powers of expropriation and also as to the legal nature of the Commission.



As to the construction of statutory powers of expropriation, in *Harding v. The Township of Cardiff* (1881), 29 Gr. 308, Proudfoot J., referring to municipal powers of expropriation, said at p. 309: "The right to take private property against the will of the owner is so serious an infringement of the rights of property that a strict construction will be placed upon it, and the authority must be found in no doubtful terms within the bounds of the statute—that is, upon a reasonable construction, either expressly or by necessary implication".

The defendant Commission is not a department of the Government of the Province of Ontario. I was referred to the judgment of the Privy Council in *The City of St. Catharines v. The Hydro-Electric Power Commission of Ontario*, [1930] 1 D.L.R. 409, where it was said at p. 418: "Their Lordships agree with the trial Judge . . . that the respondent, which is a statutory corporation created by the Legislature of Ontario with limited powers, cannot be regarded as a Government Department so as to treat an agreement entered into by the respondent as an agreement entered into by the Government."

The powers conferred on the Commission by s. 24(3) of The Power Commission Act are the powers of the Minister of Public Works under The Public Works Act "in relation to a public work" and the latter part of the subsection contains its own "dictionary" for the purposes of the application of the powers conferred by The Public Works Act. This "dictionary" is to be applied "where the context permits".

The powers of the Minister under s. 13 of The Public Works Act may be exercised where he deems it necessary "for (a) the public purposes of Ontario; or (b) the use or purposes of any Department of the Government thereof", and the section does not refer in express terms to a "public work" or to anything "in relation to a public work".

For the plaintiffs it was said that a power exercisable "for the public purposes of Ontario" is not a power "in relation to a public work" and "any Department of the Government thereof" does not mean "the Department".

The contention of the Commission was that the words in clause *a* mean public works or relating to public works and "any Department of the Government" in clause *b* means the Department of Public Works only, and that s. 13 could there-

fore be read as follows: "The Commission may for and in the name of the Hydro-Electric Power Commission of Ontario purchase or acquire and, subject as hereinafter mentioned, without the consent of the owner thereof enter upon, take and expropriate any land which the Commission may deem necessary in relation to all matters authorized by the Lieutenant-Governor in Council under section 24(1) and (2) of The Power Commission Act".

A public work is defined in s. 1(i) of The Public Works Act and the important words are as follows: "'public work' means the dams . . . and all other property belonging to Ontario, and includes all . . . properties acquired, constructed . . . at the expense of Ontario, or for the acquisition, construction . . . of which any public money is appropriated by the Legislature, and every work required for any such purpose, but not any work for which money is appropriated as a subsidy only".

It is to be noted that the definition opens with the word "means" certain things and not with the phrase "shall include" and there is one exception, namely, a "work for which money is appropriated as a subsidy only".

The argument of the plaintiff, if I understood it correctly, was that land might be expropriated by the Minister under powers contained in s. 13 which might never become a public work as that is defined in s. 1(i), or would not become such until something further was done than the initiation of expropriation proceedings.

The phrase "public purposes of Ontario" is of broad and vague import. Some indication of the variety of subject-matters which may be covered by the phrase "public purpose" is to be found in the American work Words and Phrases, vol. 35, at p. 296, where the subject-matters are indexed. The phrase "any public purpose" was considered and discussed in *Hamabab Framjee v. Secretary of State for India* (1914), I.L.R. 39 Bom. 279, a digest of which is found in Burrows, Words and Phrases Judicially Defined, vol. 4, p. 433. In that case the phrase appeared in a lease granted by the East India Company which provided for the retaking of the land by the company for any "public purpose". Burrows, *loc. cit.*, quotes the following passage:

"The argument of the appellants is really based upon the view that there cannot be 'a public purpose' in taking land if

that land when taken is not in some way or other made available to the public at large. Their Lordships do not agree with this view. They think the true view is expressed by Batchelor, J., where he says ' . . . in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned.' "

This particular judicial construction is not directly helpful in construing the words in s. 13, but I think it does illustrate the broad scope of the possible meaning of the words "for the public purposes of Ontario".

The meaning of the phrase must be considered in the light of the particular instrument in which it is contained and the fact that it appears in a statute concerned with public works might lead to a kind of primary presumption that the phrase had reference to public works. On the other hand, what is a public work is defined with some precision in s. 1(i) of the Act and the Legislature could have expressed its intention quite clearly by appropriate language either in s. 1(i) or in s. 13, had its intention been to confer powers in s. 13 only as to, or relating to, public works.

In view of the definition of "public work" and of the fact that "public work" is not mentioned in s. 13, and the wide import of the words "public purposes", I have come to the conclusion that the subject-matter of the powers in clause *a* of s. 13 is wider than "public works" or "matters in relation to public works".

Counsel for the Commission contended that "the public purposes of Ontario" were identical with the purposes of the Commission so that s. 13(a) means "for the purposes of the Commission". As to that contention, it is common ground that the Commission is a statutory corporation with limited powers and a legal entity separate from the Province of Ontario. While the purposes of the Commission are no doubt of great consequence to the people of this Province, the functions of the Commission, as I read The Power Commission Act and related statutes, are the development or generation of electrical power and its distribution to municipalities for the benefit of the inhabitants and also directly to certain persons or corporations



in the Province. The purposes of Ontario are much wider in scope and it is probable and certainly possible that from time to time there may be a conflict between the public purposes of Ontario and the limited purposes of the Commission.

The Public Works Act confers on the Minister of Public Works other powers than those described in s. 13 and s. 24(3) of The Power Commission Act is therefore not rendered meaningless by a construction of s. 13 that excludes the powers in that section from incorporation in The Power Commission Act. By s. 11 the Minister may require any person having the possession of certain specified types of documents "relating to any public work" to deliver them to the Department without delay. By s. 12 the Minister may, "for any purpose relative to the use, construction, maintenance or repair of a public work, or for obtaining better access thereto and without the consent of the owner", do certain things. By s. 15 the Minister may obtain rights of way for transporting gravel and other material from land on which such material is found to land upon which there is a public work. By s. 16 the Minister may employ an Ontario land surveyor or an engineer to make a survey and establish boundaries of any property acquired or to be acquired for a public work. These sections all refer to a public work or something relating to or "relative to" a public work.

It will be noted that in the case of the sections just mentioned the dictionary supplied by s. 24(3) of The Power Commission Act may be applied precisely and without difficulty to these sections. However, when applying the dictionary to s. 13, there are difficulties in the way when one seeks to apply it to clauses *a* and *b*.

Section 24(3) does not include the word "Ontario" to be read as "Commission" in clause *a*. According to the contention of counsel for the Commission the words "any Department of the Government" in clause *b* must be read as "the Department" and s. 1 of The Public Works Act defines "the Department" as meaning the Department of Public Works. I cannot agree with the contention of counsel for the Commission as to the meaning he attributes to clause *b* of s. 13.

Some assistance may be obtained in determining whether the powers of the Minister under s. 13 of The Public Works Act are conferred on the Commission by s. 24(3) of The Power

Commission Act by a consideration of the powers conferred in subss. 1 and 2 of that section. The powers so conferred are not absolute, but require, before their exercise by the Commission, the authorization of the Lieutenant-Governor in Council. In this manner the Legislature has imposed a control, through the executive branch, over the operations proposed by the Commission and of the exercise of the compulsory and other powers conferred in s. 24(1) and (2).

One of the powers which require authorization by the Lieutenant-Governor in Council is contained in clause *a* of s. 24(2), which gives the Commission power, when so authorized, to acquire land capable of being used for transmitting electrical power and to expropriate any such land without the consent of the owner. This is the very power that the Commission contends it has under s. 24(3) and s. 13 of The Public Works Act and that it has purported to exercise according to its own judgment as to what is necessary. The conclusion is not easily reached that the Legislature would confer a power of expropriation on the Commission, to be exercised only with the authorization of the executive, and in the same section confer the same power to be exercised by the Commission without any authorization and as the Commission in its judgment deems necessary.

If the contentions of the Commission are correct, and if the Commission has the same immunity from giving any explanation as has the Minister of Public Works under s. 17(5) of The Public Works Act, which may be the case by reason of s. 24(3) and (5) of The Power Commission Act, then some of the observations in *Boland v. Canadian National Railway Company*, [1927] A.C. 198, 59 O.L.R. 486, [1926] 4 D.L.R. 193, [1926] 3 W.W.R. 100, are appropriate. In that case the extent of the powers of expropriation conferred on the railway company by its special Act of incorporation, which, in turn, incorporated certain powers set out in The Expropriation Act, R.S.C. 1927, c. 64, was under consideration. Viscount Dunedin said at p. 209:

"It is, of course, not open to any judicial tribunal to question the wisdom of the legislature when the terms of the legislation are explicit, but in order to aid construction it is legitimate to look at the opposing contentions. If Orde J.'s view were right, the result would be very astounding. The railway authorities would have the right to take any land anywhere for any pur-

pose whatever, and with the immunity from giving explanation afforded by s. 11 they could requisition lands which had no connection with the undertaking, and they might proceed to dispose of them or use them as they pleased. Even as it is, the powers are very wide, for they get rid of much procedure and some checks which would have effected them had the proceedings been under the Railway Act. It is not a conclusion to be easily reached that they should act in such a matter with all the powers of an autocratic despot."

Even if the immunity of the Minister under s. 17(5) of The Public Works Act does not apply to the Commission, the observations just quoted apply to the extent that the Commission would have the power to take any land anywhere so long as the land could be said to be "in relation to"—a term of wide import—any one of the many matters authorized in s. 24(1) and the fourteen clauses in s. 24(2).

During the course of his argument counsel for the Commission stated that the Commission could have proceeded to take the plaintiffs' lands under the powers contained in s. 32 of The Power Commission Act. That section provides that once the Lieutenant-Governor in Council has authorized the exercise of any of the powers set out in clause *g* of s. 24(2) the Commission may proceed to enter on and use any lands without notice and without any preliminary action. Counsel stated that he was not relying on this power as a reason why an injunction should be refused, and I am somewhat at a loss as to why the power was mentioned at all, but it having been mentioned, it may be advisable to deal with it.

That part of clause *g* incorporated in reg. 2(c) of the order-in-council refers to the transmission of power "to or from or for any person". As I understand it, the authority covers the transmission of power as between the Commission and some third person, and not the transmission of power between two works of the Commission, which is covered by clause *e* of s. 24(2). The material filed by the Commission states that it is the transmission of power between the works of the Commission that is involved in these proceedings, and the right of the Commission to invoke the drastic powers in s. 32 is not free from doubt.

I have come to the conclusion, for the reasons already indicated, that s. 24(3) of The Power Commission Act does not



confer on the Commission the powers of the Minister set out in s. 13 of The Public Works Act. As counsel for the Commission conceded that if the Commission did not obtain the powers under s. 13 the expropriation of the plaintiffs' lands was unlawful, I have not considered any other section of The Public Works Act in support of the expropriation proceedings.

In view of my conclusion as to s. 13 it is unnecessary for me to come to a conclusion on the plaintiffs' second point, which was that even if the powers in s. 13 were conferred on the Commission by s. 24(3) that section could not apply in this case.

The purported expropriation of the plaintiffs' lands being unlawful, the plaintiffs are entitled to an injunction against the defendant Commission in the terms of the prayer for relief in the statement of claim.

On the 4th March last, when counsel for the Commission made application that the order made on the 2nd March be reconsidered and dealt with as on a motion for judgment, counsel for the plaintiffs asked that in the event that a permanent injunction should be granted, the other relief claimed in the statement of claim be disposed of at the same time, including the damages claimed, and he suggested a reference to the Master to determine the damages. Counsel for the defendant said he had no instructions as to these suggestions. If the plaintiffs desire to renew their application, I will hear counsel at any time before judgment is taken out.

The plaintiffs are entitled to their costs.

*Judgment for plaintiffs.*

*Solicitors for the plaintiffs: Mason, Foulds, Arnup, Walter & Weir, Toronto.*

*Solicitors for the defendant: Zimmerman, Blackwell & Haywood, Toronto.*

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[LEBEL J.]

**Probyn v. The Sovereign Life Assurance Company of Canada.**

*Insurance—Life—Options Given to Policyholder—Right to Apply for Paid-up Policy according to "Table of Guaranteed Values" in Policy—Offer of Paid-up Policy for Less—Refusal of Policyholder—Mistake of Insurer in Policy.*

An insured, P, applied for a policy of paid-up insurance in accordance with a provision in his policy and with a "Table of Guaranteed Values" inserted in the policy. The insurer sent him an endorsement stating that he was the holder of a paid-up policy for a much smaller amount than that shown in the table. P immediately objected, and refused to accept the endorsement as valid. Correspondence followed, but the matter had not been settled when P died. His widow sued for the amount owing under the policy as written, and the insurer contended that the only amount to which she was entitled was that shown on the endorsement.

*Held*, P not having accepted the endorsement the policy remained in force as written, and the plaintiff was entitled to the amount claimed (less a deduction for unpaid premiums). If, as the defendant contended, a mistake had been made in computing the "Table of Guaranteed Values", P was in no way responsible for that mistake, while the insurer must abide by it and accept the consequences. Although P had signed an application for the paid-up endorsement, it was clear that he had signed it in blank, and that the amount shown on it (which was the same amount as in the endorsement issued) was inserted by the insurer after his signature. The insurer, when it returned the application with its alterations, became the offeror rather than the offeree, and, P having refused the offer, no agreement had ever been concluded to vary the policy as written.

AN ACTION upon a policy of life insurance.

The plaintiff claimed the amount shown as owing by the policy (less a reduction for unpaid premiums). The defendant pleaded that the policy as written had been superseded by a paid-up endorsement issued by it in 1944, under which the amount payable was substantially reduced.

1st December 1952. The action was tried by LEBEL J. without a jury at London.

*S. E. Weir, Q.C.*, and *G. W. Dunn*, for the plaintiff.

*W. E. Spencer, Q.C.*, for the defendant.

12th December 1952. LEBEL J. (orally):—This is an action upon an insurance policy on the life of one William Charles Probyn issued on 10th September 1923. The defendant admits the issuance of the policy, due payment of premiums until 20th November 1943, the death of policyholder on 29th July 1949, and also that the plaintiff is the beneficiary named in the policy.

Paragraph 3 of the statement of defence contains what I consider a very important admission of fact, in the circumstances, because if the policy, as originally written, was in force at the time of Mr. Probyn's death, as the plaintiff contends,

the amount claimed in the action is not in dispute. Paragraph 3 reads:

"The Defendant agreed if the policy remained in force to pay to the beneficiary on the death of the assured the amount of \$9,450.00 in installments as specified in Provision 16 of the said policy, or at the option of the beneficiary, the amount of \$7,000.00 as the commuted value thereof."

The defendant disputes the plaintiff's claim in part only. It has paid into court \$3,699, together with \$181.50 interest and \$85 costs, or \$3,965.50 in all. This amount, it says, is in full discharge of its liability under the policy. As to the balance of the claim, it says that there was in existence at the time of the policyholder's death an endorsement of the policy which was binding on the deceased and on the plaintiff as his beneficiary. Paragraphs 5 and 6 of the statement of defence set out this allegation as follows:

"5. On March 1st, 1944, the assured applied to the Defendant, in accordance with Provision 15 of the said policy, for a paid-up policy and in accordance with such application, the Defendant granted to the assured by endorsement attached to and forming part of original policy number 17825, dated April 10th, 1944, paid-up insurance payable on the death of the assured in the amount of \$4,992.50 payable in installments as therein set out or at the option of the beneficiary, the amount of \$3,699.00 as the commuted value thereof.

"6. No premiums were paid by or on behalf of the assured subsequent to March 1st, 1944."

The endorsement referred to in para. 5 of the statement of defence was filed as ex. 4 at the trial. It purports to make the policy a paid-up life policy having a commuted value of \$3,699. The plaintiff pleads in her reply, and argues, that this endorsement formed no part of the policy, since it was never accepted by the policyholder in his lifetime. The plaintiff's argument, therefore, is that the policy as it was issued originally was in full force and effect at the time of the death of the deceased policyholder, unencumbered, if I may use that word, by the disputed endorsement. The plaintiff thus contends that she is entitled to be paid \$9,450 in the amount of the instalments specifically mentioned in Provision 16 of the policy, or, at her option, \$7,000, the proper commuted value, less the amount of the automatic



loan represented by unpaid premiums and interest as set forth in Provision 13 of the policy. That, briefly, is the issue.

The fact that the premiums were not paid for more than 5 years is not conclusive, in my opinion, one way or the other, because the deceased was entitled to rely on the provisions contained in Provision 13 of the policy, having to do with automatic non-forfeiture; and Mr. Price, the actuary who was called for the defendant, said, in effect, that unless the policy was subject to the disputed paid-up endorsement it was in force at the time of death because of those provisions.

Now, no authority need be cited to support the proposition that the onus is clearly upon the defendant to prove the existence of the disputed endorsement. In other words, the defendant must show that by reason of an agreement made subsequent to the policy it is excused from performing its obligations under the policy. I have reviewed the correspondence, put in by agreement as ex. 3 at the trial, in the light of the evidence, and I am satisfied that the defendant has failed to discharge this onus.

I am not going to review the correspondence at length, except to say that at no time did the policyholder indicate that he was prepared to accept a paid-up policy having a commuted value of \$3,699. The trouble arose, it seems to me, as a result of the "Table of Guaranteed Values" contained in the policy. It was said by the defendant's actuary (see his letter dated 3rd April 1944) that this table was included in the policy in error; in other words, that some other table of values should have been substituted since the policy was issued on an instalment basis. The defendant surely knows that a policyholder cannot be held in any way responsible for an error of that kind. If an error was made, as was suggested, then the insurer must abide by it and suffer the consequences. Incidentally, the same error, if such it was, was made by the defendant's branch-office secretary when he read the policy. After the policyholder had applied informally for a paid-up policy on 10th December 1943, the branch-office secretary wrote him on 11th December 1943, telling him that if the loan then outstanding on the policy was repaid, the paid-up value of the contract at that time was \$4,961.25. This figure was undoubtedly, as I have said, in accordance with the guaranteed values contained in the policy, and mention of it caused all the difficulty that followed. After

making sure that the policyholder intended to pay off the loan on the policy, the defendant's branch-office secretary wrote him on 13th March 1944, saying in part:

" . . . the above policy is returned herewith duly endorsed converting same into paid-up non-participating insurance of \$3,699.00. The cancelled loan agreement is also returned.

"You will note from the supplementary form attached to the paid-up endorsement that we had to take into account the semi-annual premium which was due November 20, 1943, and this, of course, resulted in a slight reduction in the paid-up values as when I wrote you first of all quoting the paid-up value as \$4961.00 on December 11th I assumed that all indebtedness was going to be taken care of, and I mentioned this point in my letter to you of February 23rd. You will remember you repaid the loan, but did not pay the outstanding November, 1943, premium and as stated above, this is shown in the supplementary form as a charge, and is the reason for the paid-up value being \$3,699.00."

The policyholder was thus told that because the premium, amounting to \$75, had not been paid on 20th November 1943, the paid-up value of the policy was some \$1,200 less than it was said to be in the branch-office secretary's letter dated 11th December 1943. No wonder he could not understand it. Instead of frankly saying that the figure \$4,961.25 had been quoted in error, if such was the case, the branch-office secretary persisted in offering the same excuse for the very sizeable reduction in the paid-up value, until Mr. Weir, the policyholder's solicitor, made him understand that the explanation was not acceptable. The matter was then turned over by the defendant's branch-office secretary to his head-office, but the assistant-actuary there was also unable to satisfy Mr. Weir. The correspondence makes this perfectly plain. At one time, to satisfy Mr. Weir's continued objections, he changed the figure from \$3,699.00 to \$4,992.50, which was a figure slightly in excess of what the guaranteed values called for, but the instalment payments were changed materially, so that the beneficiary would have had to wait a much longer period of time to obtain the proceeds of the policy. Naturally, Mr. Weir again objected.

During the exchange of letters the disputed endorsement, in its original and amended form, was sent back and forth. Eventually, on 4th May 1944, it was returned by the defendant to

Mr. Weir, who retained it. What, I suppose he felt, was to be gained by sending it back again, since he had already made it clear that the endorsement was unacceptable? On 26th June 1944 he wrote to the defendant suggesting that the premiums and interest thereon be refunded "as a way out of the impasse". This the defendant did not see fit to do, and there the matter ended.

It seems to me that the defendant has regarded, and still regards, the problem here as an actuarial one, whereas it is not actuarial at all. It is a legal problem—an elementary matter of offer and acceptance. Whatever the policy may have been worth as paid-up insurance at the time the policyholder attempted to convert it into that form of insurance, he never agreed to convert it if it was to have a paid-up or commuted value of only \$3,699 at death, or if it was to have a value of \$4,961.25 payable in instalments different from those specified in the policy. And the fact that the matter was allowed to remain dormant over a period of more than 5 years, and until after the policyholder's death, does not assist the defendant. Silence is not the equivalent of assent.

It might be said that the formal application for the paid-up policy, filed as ex. 2, assists the defendant, but it was executed by the policyholder in blank. The policy number and the name of the insured at the top of the form were undoubtedly typed on the form at the time the policyholder signed it, but that was all. Upon receipt of the signed application the defendant inserted all the provisions of the endorsement over the policyholder's signature, including \$3,699 as the commuted value. The policyholder at once objected to the amount, and, as I have said, never afterwards agreed to accept a paid-up policy having a commuted value of that amount in exchange for the benefits he felt he had under the policy. It is plain that when the defendant returned the application form with its insertions it became the offeror, not the offeree. Moreover, the policyholder's right to refuse to accept something less than he felt he was entitled to in exchange for his policy as issued is recognized by the disputed endorsement itself. It reads in part:

" . . . and my acceptance of such policy, containing a copy of such amended supplementary application, shall constitute an approval of such amendment without further reference to me, provided however, that my right to decline acceptance of such



policy in the event of material changes of plan or other conditions being made in such application is hereby reserved."

For these reasons, I find that the defence fails. The plaintiff is entitled to recover either amount claimed in the alternative and recognized by para. 3 of the statement of defence, less the loan existing under Provision 13 of the policy. The correspondence shows that the company might have resolved the dispute with the policyholder or the plaintiff for less money. At one time Mr. Weir was prepared to advise acceptance of about \$5,000, or a little less, and at another time he was prepared to advise acceptance of that amount if the instalments mentioned in the policy were adhered to. In both cases the defendant declined his offer; therefore, it must be held to its obligations as clearly expressed in the policy at the time it was issued.

The plaintiff's counsel now indicates that his client has elected to take \$7,000, the commuted value, instead of the larger sum payable in instalments. The plaintiff is entitled to interest on this sum from the date of the issue of the writ, because there was delay in completing the forms on the part of the policyholder's estate. And the plaintiff is, of course, entitled to her costs.

I have endorsed the record as follows: "Judgment for \$7,000.00 less the total amount of the unpaid premiums, and interest thereon in accordance with Provision 13 of the said policy, and for interest on the balance thus ascertained from the date of the teste of the writ, and for costs."

*Judgment for plaintiff.*

*Solicitors for the plaintiff: Weir & Associates, London.*

*Solicitors for the defendant: Jeffery & Jeffery, London.*

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[JUDSON J.]

[COURT OF APPEAL.]

**Waxman v. Yeandle et al.**

*Fraud and Misrepresentation — Effect of Innocent Misrepresentation — No Cause of Action for Damages — Election to Affirm or Rescind Contract — Final Nature of Election.*  
*Contracts — Effect of Misstatement of Fact Inducing Contract — Absence of Fraud — Whether Statement a Warranty, Condition or mere Representation — Rights of Other Party — Impossibility, in Case of Innocent Misrepresentation, of Completing Purchase and Demanding Abatement of Price or Damages for Misrepresentation.*

It is firmly established that there is no right to claim damages for an innocent misrepresentation. *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 at 51, quoted and applied. One who is induced to enter into a contract by an innocent misrepresentation, fundamental to the making of the contract, is entitled to rescind the contract and recover any deposit he may have made. *Redgrave v. Hurd* (1881), 20 Ch. D. 1; *Newbigging v. Adam* (1886), 34 Ch. D. 582, applied. But he must elect whether he will rescind the contract or affirm it, and his election, once made, is final. He cannot, in the case of a sale, insist upon completing the contract and demand an abatement of the purchase-price, at least in cases where the misrepresentation is not in respect of the quantum of the subject-matter of the sale.

The plaintiff agreed in writing to buy an hotel from the defendants, the written offer containing a clause to the effect that the offer was made on condition that the vendors represented that the gallonage of beer sold in the hotel in a stated year was 28,000 gallons. The actual gallonage was in fact 2,200 gallons less, and the plaintiff discovered this fact before he closed the deal. He nevertheless completed the purchase, and then sued for damages by reason of the misrepresentation. *Held*, the action must fail. The misrepresentation was an innocent one, and it was a mere representation, and neither a condition of the contract nor a warranty. The plaintiff therefore could have rescinded the contract and recovered his deposit, but he had elected to complete the contract, and had consequently no cause of action for damages.

AN APPEAL by the plaintiff from the judgment of Judson J., *infra*, dismissing the action. The following statement of facts is taken from the judgment of ROACH J.A.:

"The defendants were the owners and operators of the Calcot Hotel in the township of Sandwich West on the outskirts of the city of Windsor. By an agreement in writing consisting of an offer to purchase signed by the plaintiff and dated 21st July 1950, and an acceptance thereof signed by the defendants and dated 3rd August 1950, the plaintiff agreed to purchase and the defendants to sell the said hotel, including the goodwill, land, buildings, chattels and equipment, for the sum of \$110,000.

"The hotel had only eleven bedrooms; its main business was the sale of beer.

"The offer to purchase contained the following: 'The offer is given on condition that the Vendors represent that their sale of beer for the year ending the 1st day of August 1950 exceeds

Twenty-eight Thousand (28,000) gallons.' The actual gallonage sold in that period was only 25,789 gallons. . . .

"The plaintiff discovered the discrepancy on or about 30th August 1950, and brought it to the attention of the defendants' solicitors. He claimed to be entitled to an abatement of the purchase-price. The defendants refused to give any abatement and advised the plaintiff that he could either complete the purchase at \$110,000 or call the deal off and get back his deposit.

"There were protracted negotiations and discussions between the parties thereafter and finally under date 29th September 1950 the defendants wrote the plaintiff as follows:

" 'We hereby agree with you that provided you proceed with your application for approval of the transfer of licenses of the above hotel to you not later than Thursday, October 5th, 1950 and provided further that in the event that the transfer is approved you close the purchase within one week following the date of such approval, the closing of the transaction will be without prejudice to the rights of all parties arising out of or in any way connected with the conditions contained in the written agreement between the parties as follows:

" ' "The offer given on condition that the Vendors represent that their sale of beer for the year 1950 exceeds Twenty-eight Thousand gallons." ' "

"The reference in that letter to the sale of beer for the year 1950 obviously was intended to mean the sale of beer for the year ending 1st August 1950, and the reference to the approval of the transfer of licences refers to approval by the Liquor Control Board of Ontario.

"In due course approval was given to the transfer of the licences and the transaction was closed on the basis of the total purchase price being \$110,000. This action followed."

10th and 11th December 1951. The action was tried by JUDSON J. without a jury at Windsor.

*M. Yuffy*, for the plaintiff.

*J. Holland*, for the defendants.

11th December 1951. JUDSON J. [orally, after stating the facts leading up to the offer and acceptance, and the plaintiff's discovery of the discrepancy]:—When the defendants made the representation as to the gallonage they made it on the basis of



the computations I have mentioned.\* They had a better method of checking the gallonage. They had the monthly reports from the Liquor Control Board, and those reports were in the hands of their auditor. They could have got that information from the auditor, perhaps, just as conveniently as they got it from the beer-books, but they did not apply to him for the information. I am sure that neither party contemplated closing a deal of this kind without checking the information with the Liquor Control Board. Both parties knew that the Board had the precise information and that a check would be made, and indeed the defendants, very early in the negotiations, gave the plaintiff the necessary authority to check the figures with the Liquor Control Board, and it was no doubt as a result of the examination that Sherman & Midanik [the plaintiff's solicitors] were able to ascertain the precise gallonage and report on it on 30th August.

In these circumstances I have no hesitation in finding that this representation was not made fraudulently, that is, with knowledge of its untruth, or recklessly, careless as to whether it was true or false. At the most all I can say is that the parties could have adopted a more precise method of getting the exact information they wanted or needed. There was never any intention on the defendants' part to mislead the plaintiff, and in a transaction of this kind it would be foolish beyond words to set out to mislead anybody on figures of this kind, which could be checked, and which both parties expected would be checked before closing.

[His Lordship then stated the positions taken by the parties respectively and quoted the letter of 29th September 1950, *supra*, and proceeded:]

I now proceed to state what, in my opinion, were the plaintiff's rights when he discovered that the representation contained in this contract was untrue. I have already stated that, in my opinion, the representation was not a fraudulent misrepresentation but an innocent one. However, it is a representation that is fundamental to the making of the contract. A shortage of 2,200 gallons out of a total of 28,000 is a substantial one. Since *Redgrave v. Hurd* (1881), 20 Ch. D. 1, and *Newbigging v. Adam* (1886), 34 Ch. D. 582, a plaintiff in the position of this plaintiff could have rescinded the contract and

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\* The manner of the making of these computations is fully set out in the reasons of ROACH J.A., *infra*.

got his money back. Such an offer was made to this plaintiff, although no formal tender was made, but there appears to me to be no doubt on the evidence that he could have got his money back if he had wanted it.

The plaintiff did not want his money back. What he was asserting was in effect this: "I have a contract. I am entitled to have that contract performed, but I do not wish to pay the price specified in the contract but a lower price, because I am entitled to an abatement of the purchase-price." In making that assertion the plaintiff misconceived his rights. His right was either to elect to rescind the contract or to go on with it. In my opinion he has no right to compel the defendants, in the circumstances of this case, to accept a lower price.

It has been urged upon me that I should act on the analogy of the specific performance cases. A purchaser of real estate, before closing a transaction, discovers that there is a shortage in the subject-matter contracted for. Nevertheless, he wants the subject-matter contracted for and he is prepared to pay for it, but he asks the Court to make an allowance for the shortage. It seems to me that the analogy fails from the outset. The subject-matter of this contract was an hotel and its contents. There was no deficiency in the subject-matter; it was all there. I think there is no question that the plaintiff got under the contract everything that he was entitled to. What he did not get was an hotel that had sold 28,000 gallons the previous year, but he knew that before he paid his purchase-price. There appears to me in these circumstances to be no analogy whatever between this case and the cases of specific performance with compensation.

The law here seems to be completely covered in the statement in 23 Halsbury, 2nd ed. 1936, p. 84, where it is said: "A representee who knows the truth is not deceived. Proof, therefore, of such knowledge is a complete answer to any proceeding founded on misrepresentation, whether such misrepresentation was fraudulent or innocent, and it is sufficient to show that the representee was cognisant of the real facts at any time before he altered his position. . . ."

Then on p. 100 of the same volume: "The right which accrues to the representee, on discovery of the real facts, is, in the first instance, a right of choice or election only. Such right,

when once exercised, is exhausted; whence it follows that, if by express notice, or impliedly by conduct, the representee elects to affirm, he can never afterwards claim to avoid; and that, if he has once elected to avoid, he can never afterwards be allowed to affirm in his own interests. . . . ”

What occurred in this instance was an election on the part of the plaintiff to affirm this contract, with a reservation of what he assumed to be his right to sue for damages.

The evidence leads me unmistakably to the conclusion that the plaintiff was satisfied with his bargain apart from the hope that he would get it for a price lower than the contract price because of the initial misrepresentation. I have no doubt that in fixing the purchase-price the gallonage is an important element, but I am certainly not accepting any evidence that has been given here that it is the only factor, that is, that you just take the gallonage and multiply it by \$4 and arrive at an approximate price. There has been a good deal of evidence as to the nature of the hotel. It is almost new—at the time of the contract it had been built for  $2\frac{1}{2}$  or 3 years. It is in a very desirable location. The plaintiff himself, in the witness-box, said that he had no desire to sell and was not dissatisfied with the hotel. He was merely asserting, as I have already stated, that he had a right to damages because of the initial misrepresentation.

I can see no analogy between this case and the cases of sales of goods where a plaintiff, knowing of the breach of a condition, may accept the goods and in so doing waive the condition and treat the breach of condition as a breach of warranty. In a sale of goods case if that occurs there is something inherent in the actual goods sold that gives rise to this right. The present case is not one of breach of warranty. There is no warranty as to future business. The representation was that in a named year this hotel had sold a stated amount of beer. In my opinion it was a representation inducing the contract and external to the contract. It was not a term of the contract either by way of condition or as a warranty. Even if it were such a term, the plaintiff did not rely on it.

My opinion, therefore, is that the claim for damages for breach of what is referred to as a condition of the contract fails.



There was another claim for damages for an alleged deficiency in the chattels. It was estimated by the plaintiff at \$500. It does not appear to me that any proof has been offered that there was such a deficiency. The plaintiff was given an inventory as early as 3rd August 1950 of the chattel contents of the hotel, and he admits that he got all these chattels. He complains that he did not get an electric refrigerator and that a washing-machine was substituted. He was told very early, almost as soon as this list of chattels was delivered, that the electric refrigerator, which was said to be worth about \$200, was not included in the sale. As to some folding-chairs which the plaintiff says were removed, these were not on the inventory and they did not belong to the business; they belonged to somebody else. It appears to me that this claim for damages fails as well.

The action will be dismissed with costs.

*Action dismissed with costs.*

15th and 26th January 1953. The appeal was heard by LAIDLAW, ROACH and J. K. MACKAY JJ.A.

*J. D. Arnup, Q.C.*, for the plaintiff, appellant: The provision in the contract as to gallonage constituted a warranty: Salmond and Williams on Contracts, 2nd ed. 1945, p. 44. A warranty is an undertaking either that a particular event will occur or that a particular fact exists. In this case the representation became a warranty as soon as it was embodied in the contract. It was not a mere inducement leading to the contract, but was a vital part of the contract. I rely on *De Lassalle v. Guildford*, [1901] 2 K.B. 215; *Pennsylvania Shipping Co. v. Compagnie Nationale de Navigation*, [1936] 2 All E.R. 1167 at 1171; *Leaf v. International Galleries*, [1950] 2 K.B. 86, [1950] 1 All E.R. 693 at 696-7. The decision in *Mahon v. Ainscough*, [1952] 1 All E.R. 337, is distinguishable, in that there the representation was not embodied in the contract.

[LAIDLAW J.A.: As I understand your argument you must prove (1) a contractual relationship, and (2) a right to damages.] No. In the case of a warranty the contracting party, as part of the bargain, warrants the representation. The law does the rest. When the purchaser asked the vendor as to the gallonage, the answer was a mere representation, but once it

had been embodied in the contract it became a warranty. It was a representation as to a past fact.

There is evidence that hotels in Windsor are sold on a gallonage basis, and that the recognized price is \$4 a gallon. The difference between the figure represented and the actual gallonage is material and substantial, and the damages should be estimated on that basis, or a reference should be directed.

The fact that the plaintiff discovered the discrepancy before the deal was closed has no effect, since he did not know of it before he entered into the contract.

My submission is that we had an election as to our remedies. We could either rescind the contract by reason of the misrepresentation, or complete the transaction and claim damages. We chose the second course. Had we sued for specific performance with an abatement of the purchase-price we must have succeeded. The letter, ex. 3, expressly preserves our rights in that respect. The alternative to specific performance with an abatement is a judgment in damages: *Rutherford v. Acton-Adams*, [1915] A.C. 866 at 868, 870.

*J. J. Robinette, Q.C.*, for the defendants, respondents: The plaintiff could not succeed either in a claim for damages or in an action for specific performance with an abatement unless he established that the representation amounted to a warranty. There must have been a representation, and it must have been material: *Behn v. Burness* (1863), 3 B. & S. 751 at 754, 122 E.R. 281; *T. & J. Harrison et al. v. Knowles & Foster*, [1918] 1 K.B. 608 at 610. This contract was drawn by the plaintiff's solicitor.

This clause is neither promissory nor obligatory. The distinction between a promise or covenant on the one hand, and a condition on the other, is pointed out in Williston on Contracts, rev. ed. 1936, para. 665, p. 1909 (vol. 3). [ROACH J.A.: Can there be a condition that is not a warranty?] Yes. An example is a condition in an insurance policy; there is no liability in damages if the condition is not performed.

Even if this is a warranty, the plaintiff is still not entitled to succeed in his action. The closing took place "without prejudice to the rights of both parties". There are two alternatives, and if the purchaser completes the deal with knowledge of the facts there is no right to damages: *Ontario Asphalt*

*Block Co. v. Montreuil* (1913), 29 O.L.R. 534 at 545, 15 D.L.R. 703, varied 32 O.L.R. 243, 19 D.L.R. 518; 52 S.C.R. 541, 27 D.L.R. 514.

Specific performance with an abatement can be claimed only if there is some deficiency in the subject-matter: *Rutherford v. Acton-Adams*, [1915] A.C. 866; *Rudd v. Lascelles*, [1900] 1 Ch. 815; *Ontario Asphalt Block Co. v. Montreuil*, *supra*, at 547, 548. There was here no deficiency in the subject-matter; the purchaser got the hotel he expected to get.

There was no evidence to support an assessment of damages.  
*J. D. Arnup, Q.C.*, in reply.

*Cur. adv. vult.*

23rd March 1953. The judgment of the Court was delivered by

ROACH J.A. [after stating the facts as above]:—In his statement of claim the plaintiff pleaded:

*First:* That the representation as to the sale of beer was made fraudulently, the defendants either knowing it to be false or acting recklessly and not caring whether it was true or false.

*Second:* That by the terms of the agreement the defendants “represented and contracted and agreed with the plaintiff” that the sale of beer during the specified period exceeded 28,000 gallons.

On those pleas the plaintiff alleged that he had suffered damages and would continue to suffer loss or damage in the operation of the hotel.

As already stated, the learned trial judge denied the first plea and in doing so I think he was right.

On the second plea the learned trial judge held that the representation was not a term of the contract, either by way of condition or warranty, and that even if it were such a term there was no reliance on it.

On this appeal counsel for the appellant confined his argument to the second plea. He argued that the defendants by accepting the offer had warranted that the sale of beer during the specified period was that set out in the paragraph contained in the offer and which I earlier quoted; that the plaintiff, having learned of the deficiency before closing the deal, could elect to



go on with the transaction and later claim damages for breach of that warranty.

The first question which this Court has to decide is whether the statement was a mere representation, a condition or a warranty.

After anxious consideration I have concluded that the statement amounts to no more than a mere representation. The fact that it is contained in the written offer does not make it an integral part of the contract. By embodying that paragraph in the offer the plaintiff, in the event that the defendants should accept the offer, thereby put beyond dispute the fact that the representation was made, but the plaintiff did not thereby put himself in any higher position. He is in no higher legal position than if the paragraph had not been in the written offer and he had proved that the representation had been otherwise made.

The statement was an innocent misrepresentation arising out of circumstances to which I shall later refer.

In *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 at 51, Lord Moulton says: "It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made."

Prior to the making of the offer, the plaintiff had never met any of the defendants. The transaction was negotiated by an agent who learned that the hotel premises and business might be for sale and that the plaintiff might be a possible purchaser. The agent attended at the hotel premises and interviewed the father of the defendants.

Since the main business of this hotel was the sale of beer the volume of sales was important, and that matter was discussed between the agent and Mr. Yeandle. The only records which were in the hotel premises on that occasion were the beer-books. These are books containing order forms which vendors of beer are required to fill out and use each time they purchase beer from a brewery. All the other records were in the possession of the defendants' auditors. Rather than wait until they could be obtained from the auditors or go to the office of the auditors and get the information, the agent and Mr. Yeandle took the beer-books, one called off the quantities from

the stubs of the orders, the other wrote down the quantities, and the additions were made. It is obvious that the total gallonage thus obtained could not be the total for the year ending 1st August 1950, because that computation was thus made some time prior to the date of the offer and the offer was not made until 21st July 1950. It was probably estimated that having regard to the total gallonage up to the date that the computation was made, the total gallonage for the year ending 1st August 1950 would exceed 28,000 gallons. It appears that the computation up to the date it was made was wrong but that was due to innocent inaccuracies in making the computation. That there was no intended deceit by the vendors is, I think, made abundantly clear by the fact that after the offer had been made and accepted, the vendors authorized the Liquor Control Board to disclose to the plaintiff the total gallonage of beer sold up to 1st August 1950. Monthly returns had to be made by the defendants to the Liquor Control Board and as a result the Board had a record of the monthly sales. I should have thought that a reasonably astute purchaser of such a business would, in any event, have recourse to the records in the possession of the Liquor Control Board as to the volume of sales. In my opinion this plaintiff is an astute purchaser.

In order to succeed in this action the plaintiff would have to prove that the defendants contracted with him that the representation was true and that in the event of its turning out to be untrue they would indemnify him against any loss which might thereby be occasioned to him. I am unable to construe the paragraph in the offer dealing with gallonage as amounting to such a contract.

The agent, having obtained the information as to gallonage in the way I have described, reported to the plaintiff that the gallonage for that period would exceed 28,000 gallons. The plaintiff, who lived in Toronto, had visited the hotel on at least one occasion and made some observation for himself. Having obtained the information from the agent, the plaintiff then went to his solicitors in the city of Toronto and instructed them to prepare the offer. They did so. The offer is carefully drawn and by that I mean that precise language is used to express the intention.

I am unable to conclude from the language used in the paragraph in question that it was the intention that that paragraph should constitute a warranty. A person can be made liable if he warrants the truth of a representation, but it must be made abundantly clear that the warranty was in fact given. The circumstances under which the gallonage was computed, the reasonable assumption that the plaintiff in any event would have recourse to the records of the Liquor Control Board, and the language of the paragraph in the offer which I have quoted is inconsistent with the view that the defendants were warranting as a fact that the gallonage for the year ending 1st August 1950 would exceed 28,000 gallons.

The plaintiff misconceived his rights. This being an innocent misrepresentation, the plaintiff had the right to rescind and get back his deposit. He did not want to rescind. He wanted to get the hotel, but at a reduced purchase-price.

For the foregoing reasons, in my opinion, the appeal fails and should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Yuffy & Yuffy, Windsor.*

*Solicitors for the defendants, respondents: McTague, McKeon, Deziel, Clark & Holland, Windsor.*



## [COURT OF APPEAL.]

**Tarr v. Westchester Fire Insurance Company.**

*Insurance — Warranties and Representations — Special Stipulation in Policy of Fire Insurance — User of Property Insured — Rate of Premium Affected — Justness and Reasonableness of Warranty — Interpretation by Insurance Agent — The Insurance Act, R.S.O. 1950, c. 183, s. 113.*

A special clause was inserted in policies of insurance on tobacco in a processing barn, and on the barn itself, as follows: "No steamer will be left operating unattended either day or night but will be banked if coal or wood operated, or entirely shut off if oil operated during the night and at times when an operator is not in the building. . . ." The insured, who used a steamer operated by burning natural gas, left the building one morning after lighting the gas, and about 15 minutes later a fire broke out, resulting in substantial loss. The insurer declined to pay the amount of the loss, and the insured thereupon sued.

*Held*, the action must fail, on the ground of the plaintiff's breach of the warranty in the policy.

The special clause was justified under s. 113 of The Insurance Act, since it was clear that the rate of premium was affected or modified by the user of the insured property, and the warranty was not inconsistent with any statutory condition. The clause was "just and reasonable" within the rules laid down in *The City of London Fire Insurance Co. v. Smith* (1888), 15 S.C.R. 69; *The Anglo-American Fire Insurance Company v. Hendry et al.* (1913), 48 S.C.R. 577, and *McKay v. The Norwich Union Fire Insurance Company* (1895), 27 O.R. 251. These cases, although they dealt with statutory provisions different from the present s. 113, should nevertheless be used as a guide in construing the words "just and reasonable", since the statutes were *in pari materia*. *Barlow et al. v. Teal* (1885), 15 Q.B.D. 403 at 404, applied.

The fact that the warranty made no express reference to a gas-operated steamer did not mean that it was inapplicable to such a steamer. The object of the clause clearly was to obviate the danger of leaving any steamer unattended, and it should be applied to a steamer of any type in connection with which steam was generated by the combustion of any kind of fuel, and the plaintiff's steamer was clearly left "unattended" within the meaning of the warranty. *Ward v. Alliance Insurance Co. of Philadelphia* (1924), 55 O.L.R. 451; *Jeanveaux and Legault v. The Prudential Assurance Company Limited*, [1947] O.W.N. 869, applied.

The plaintiff could not take advantage of the fact that the agent through whom he obtained the insurance had told him that the warranty did not apply to a gas-operated steamer, and that all he need do, to comply with the warranty, was to turn his steamer off at nights. The agent had no authority to bind the insurer by any interpretation he might place on a policy, or to waive any provision of the policy, nor could his conduct furnish the basis for saying that the insurer was estopped from setting up the plaintiff's breach of warranty. *Torrop v. The Imperial Fire Insurance Company* (1896), 26 S.C.R. 585; *Salata v. The Continental Insurance Company*, [1948] O.R. 270 at 279; *Teasdale v. Sun Life Assurance Co. of Canada* (1927), 60 O.L.R. 201; *Sragali v. The Capital Life Assurance Co. of Canada*, [1933] O.W.N. 506, applied.

Judgment of JUDSON J., [1952] O.R. 7, affirmed.

AN APPEAL by the plaintiff from the judgment of Judson J., [1952] O.R. 7, [1952] I.L.R. 355, [1952] 2 D.L.R. 281.

5th March 1953. The appeal was heard by PICKUP C.J.O. and HOGG and AYLESWORTH JJ.A.

*J. H. Amys, Q.C.*, for the plaintiff, appellant: Section 113 of The Insurance Act, R.S.O. 1950, c. 183, permits the insertion in a policy of a clause setting forth a stipulation in respect of such user or maintenance of the insured property as affects or modifies the rate of premium, but the clause is binding on the insured only in so far as it is held to be just and reasonable. The clause in question in this action sets forth two separate and distinct stipulations in this respect, (a) one regarding the use of steamers in the building, and (b) one regarding open fires or smoking in the building. The trial judge made no finding, and there was no evidence adduced by the defendant, that the rate of premium for fire insurance on any of the insured property was affected or modified by the leaving of a gas-operated steamer in a processing-barn unattended. If there is more than one stipulation the burden is on the insurer to show that each and every one affects the premium, and it must break it down and show that the premium was reduced by a definite amount for each stipulation. [PICKUP C.J.O.: The insurer says that the rate of premium is affected by the user of the insured property, for curing tobacco.] [AYLESWORTH J.A.: Where the insurer knows that the premises are to be used for particular purposes, certain risks come to mind, consequent on that user. The user may be dangerous, necessitating a large premium unless that user is controlled or curbed in some way; if this is done, the premium may be reduced. The thing that the insurer is given power to control is the particular user of the premises. He does not have to prove that the stipulation affects the premium—it is the user.]

So far as it would have the effect of defeating our claim, the clause in question is not just and reasonable as required by s. 113. This is a new clause that was first introduced by the defendant in 1950, and it makes no reference to gas-operated steamers. The interpretation put on the clause by the authorized agent of the defendant is justified by dictionary definitions of “unattended”. [PICKUP C.J.O.: What kind of agent was this?] He was an agent to solicit policies. He submitted applications to the head office and if the company accepted an application he countersigned it and delivered it. [PICKUP C.J.O.: Where is the agent’s authority to interpret the contract?] There was no evidence that he had no such authority. [AYLES-

WORTH J.A.: Your argument is not really that the clause is not just and reasonable in itself, but that it is not just and reasonable for the insurer to enforce it; there is a clear distinction.] That is what the section says. The justness and reasonableness of the clause should be tested with relation to the circumstances of the case: *Ballagh v. The Royal Mutual Fire Insurance Company* (1879), 5 O.A.R. 87; *The City of London Fire Insurance Co. v. Smith* (1888), 15 S.C.R. 69; *McKay v. The Norwich Union Insurance Company* (1895), 27 O.R. 251; *H. P. Eckhardt & Co. v. The Lancashire Insurance Co.* (1900), 31 S.C.R. 72. This clause was unreasonable in that it required excessive vigilance.

The trial judge erred in failing to consider dictionary definitions of the word "unattended", which does not contemplate excessive diligence. The Shorter Oxford Dictionary defines it as meaning "not attended to", "disregarded", "with no one in charge". He should have considered *McKay v. The Norwich Union Insurance Company*, *supra*, as to the extent to which this special clause was binding on the insured.

The policy should be construed strictly against the insurer and liberally towards the plaintiff [PICKUP C.J.O.: You need not cite authority for that proposition.]

The learned trial judge erred in failing to give effect to the plea of estoppel set up in our reply: Everest and Strode, *Law of Estoppel*, 3rd ed. 1923, p. 245; *Teasdall v. Sun Life Assurance Co. of Canada*, 60 O.L.R. 201, [1927] 2 D.L.R. 502.

W. E. McLean, Q.C., for the defendant, respondent: We are dealing with a warranty that was insisted upon by the insurer. The disregard of this warranty was the cause of the fire—certainly the plaintiff's inattention was the main cause of the fire. The warranty was expressly designed to prevent the happening of fires in an extremely hazardous business. [PICKUP C.J.O.: It is your interpretation of this clause that there should have been someone constantly in attendance?] At least it is clear that in this case there was a leaving of the steamer such as to constitute lack of attendance as required by the clause. The trial judge has expressly so found. The situation is not dissimilar to that in *Jeanveaux and Legault v. The Prudential Assurance Company Limited*, [1947] O.W.N. 869, 14 I.L.R. 199, [1947] 4 D.L.R. 714, where the meaning of



“unattended” in a similar clause was considered, and the purpose of the warranty was recognized.

The clause as to steamers applies to all steamers, even if they are gas-operated. The words in the first phrases are absolute, and the latter part of the clause is an explanation to the insured of what he should do. He cannot turn off a coal or wood stove, and must therefore bank it; this in effect diminishes his responsibility if his steamer is operated with coal or wood. [AYLESWORTH J.A.: Was there evidence that the defendant knew that gas-operated steamers were commonly used?] There was evidence that it knew that they had come into use. The warranty is clearly directed to obviating the danger from unattended steamers. Any added words giving the insured more information cannot detract from the first absolute statement. If the warranty is good as to an oil-operated steamer it must be equally good as to a gas-operated one. To construe it as applying only to coal, wood or oil steamers is unreasonable.

Even if the old authorities are applied the trial judge was justified in holding that this warranty was just and reasonable. [AYLESWORTH J.A.: Do those authorities go any further than to say that one must look at the circumstances at the time the policy was issued?] They go a little further than that. [PICKUP C.J.O.: It is possible for the warranty to have been just and reasonable when the policy was issued, and to become unjust and unreasonable later?] Yes. One must look at what originally happened, and then at what happened later.

It is doubtful if s. 113 has any application to a special clause in a contract if that clause does not constitute a variation of the statutory conditions. There is no statutory condition dealing with the subject-matter of this warranty: *Renshaw v. Phoenix Insurance Company of Hartford, Conn.*, [1943] O.R. 223, 10 I.L.R. 92, [1943] 2 D.L.R. 76; *Earnshaw v. Dominion of Canada General Insurance Company*, [1943] O.R. 385, 10 I.L.R. 143, 80 C.C.C. 35, [1943] 3 D.L.R. 163.

An agent or canvassing agent is entitled only to do certain things, and an interpretation of the policy is clearly not within his functions. [PICKUP C.J.O.: You need not go further into that point; there is no evidence as to what the company told Columbus.] Then there can be no estoppel.

This clause should be approached with an open mind, and it should be assumed to be good until the contrary is clearly shown.

*J. H. Amys, Q.C.*, in reply: There is no evidence that gas-operated steamers are dangerous. *Jeanveaux and Legault v. The Prudential Assurance Company Limited*, [1947] O.W.N. 869, 14 I.L.R. 199, [1947] 4 D.L.R. 714, supports my proposition rather than the defendant's. The onus is on the defendant to show that this clause is just and reasonable, when s. 113 is read with s. 108.

*Cur. adv. vult.*

24th March 1953. The judgment of the Court was delivered by

HOGG J.A.:—In the action with which this appeal is concerned the appellant, a farmer who grows and cures tobacco, claimed to be entitled to the proceeds of four policies of insurance against loss by fire, issued to him by the respondent company. Policy no. 58729, dated the 23rd September 1950, covered the stock of tobacco and other materials situated in a processing-barn. Policy no. 58693, dated 15th October 1950, covered the processing-barn itself. Policy no. 58743, dated 16th October 1950, was also on the stock of tobacco and materials and supplies in the processing-barn and policy no. 58772, dated 11th January 1950, was on a farm barn and certain farm implements and vehicles.

A fire occurred on the 29th January 1951, resulting in loss and damage to the extent of \$17,013.78 to the property insured by the aforesaid policies and in due course the appellant delivered proofs of loss to the respondent company. The respondent refused to pay the amount of the loss, such refusal resulting in the present action.

Judgment was pronounced on the 7th December 1951 by Mr. Justice Judson, by which the appellant was awarded the sum of \$1,422.72 found to be due and payable under policy 58772 but the action was dismissed with respect to the claims made under the other three policies. There is no cross-appeal by the respondent company.

The learned trial judge rejected the several defences pleaded in answer to the appellant's claim except that contained in para.

9 of the statement of defence. This paragraph sets out that the first three of the several policies, that is to say, policies 58729, 58693 and 58743, contained the following clause or warranty:

“(M) No steamer will be left operating unattended either day or night but will be banked if coal or wood operated, or entirely shut off if oil operated during the night and at times when an operator is not in the building, and no open fires will be used and no smoking will be permitted in the building.”

It is then further set forth in this paragraph of the statement of defence that the appellant, in breach of the said warranty, left a steamer operating unattended in the building described in policy 58693 and containing the property described in policies 58729 and 58743, some time before the outbreak of the fire, and that this steamer was unattended when the fire started.

The learned trial judge held that the premium to be paid for the insurance was reduced because of the said warranty; that the warranty was just and reasonable, and that there had been a breach of the warranty by the appellant.

The evidence submitted at the trial establishes that the appellant, in the course of processing his tobacco, made use of an apparatus called a steamer in which steam was created by natural gas being lighted under a boiler containing water. This steamer was situated in what is called the stripping-room, a part of the curing or processing-barn. Some part of the mechanism of the steamer was in a frozen condition in the early morning of the 29th January 1951 but, according to the testimony of the appellant, it was in operation and producing steam when he left the building in which it was located and went, about 15 minutes after having lighted the gas under the boiler, to a nearby farm barn or stable.

When the appellant had been at this barn for approximately 15 minutes, he discovered fire coming through the roof of the stripping-room where the steamer was in operation. The natural gas which creates the steam, when set alight, is controlled by a valve which turns it on or off. There is evidence that this gas, in cold weather, may surge so that it may become extinguished but again become lighted. There is no evidence that there was any source of fire in the processing-



barn or stripping-room on the morning of the fire other than the natural gas burning in the said steamer.

The grounds of appeal may be stated as follows:

(1) No evidence was adduced by the respondent company that the rate of premium in connection with the said policies was affected or modified by leaving a gas-operated steamer unattended in the processing barn.

(2) The learned trial judge erred in finding that the clause relating to the steamer was just and reasonable.

(3) An error of fact was made in finding that the appellant left the steamer unattended.

(4) The learned trial judge erred in failing to consider the plea of estoppel raised by the appellant in his reply.

The first and second grounds of appeal are based upon the facts of the case as they are related to, or affected by, the provisions of s. 113 of The Insurance Act, R.S.O. 1950, c. 183.

Taking up first a consideration of the argument on behalf of the appellant in support of the first ground of appeal, and referring to the matters involved in their logical sequence, s. 108 of The Insurance Act should first be read. This section sets forth the statutory conditions which shall be deemed to be part of every contract of fire insurance in force in this Province, but subject to the provisions of s. 113 of the statute. By s. 113 certain stipulations as to risk may be inserted in a policy of insurance in the circumstances set out, without being deemed to be variations of the statutory conditions. This section reads as follows:

“Where the rate of premium is affected or modified by the user, condition, location, or maintenance of the insured property, the policy may contain a clause not inconsistent with any statutory condition setting forth any stipulation in respect of such user, condition, location or maintenance, and such clause shall not be deemed a variation of any statutory condition, and such clause shall be binding on the insured only in so far as it is held by the court before which a question relating thereto is tried to be just and reasonable.”

The clause or warranty (M) referring to a steamer is to be found in the policies in question in this appeal under the heading “Barn Warranties”.

Counsel for the appellant contended that s. 113 of The Insurance Act requires the insurer to show that the rate of premium was affected or modified by the warranty against leaving the steamer unattended. I do not think this contention can be upheld. The section relates the rate of premium to the user, condition, location or maintenance of the insured property. It does not relate the rate of premium to any particular stipulation which may be exacted by the insurer because of such user, condition, location or maintenance. The relevant user of the insured property in this case was the processing of tobacco, which involved the use of the steamer that has already been described. It was because of such user that the insurer exacted certain stipulations and, in particular, so far as this case is concerned, the aforesaid clause or warranty (M). What the insurer needed to know in order to invoke s. 113 was that the user, condition, location or maintenance of the insured property affected or modified the rate of premium.

Whether or not there is an increase in the risk is a question of fact to be decided on the evidence: *Peck v. Phoenix Mutual Insurance Company* (1881), 45 U.C.Q.B. 620. The insured must not do anything which would increase the risk to the insurer and if it is a fact that the steamer was left unattended, the Court must determine whether the risk was thereby increased during the use of the insured premises.

The premium is the consideration for the insurance and its amount is measured by the estimate of the risk formed by the insurers and based upon the circumstances. Some light upon this point is furnished by Mr. Horace Johnson, the district representative of the Hartford Insurance Company, who said that the premium rates were higher in respect of insurance on property of those in the tobacco business as distinguished from ordinary farm insurance. On this particular subject of the use of a steamer in the processing of tobacco, Mr. Johnson made the pithy observation: "I have always said that if we eliminated breakfast in the diet of a tobacco farmer, we would cut our fire losses in half." Mr. Arthur Young, the manager of the London, Ontario, office of the respondent company said in the course of his testimony that if the clause in question respecting the operation of steamers was not assented to by an applicant for insurance, the application would be declined. He further

gave evidence to the effect that what he termed credits were given which reduced the basic premium rate if the insured assented to the warranties and if a warranty was omitted, a credit was not granted.

The following decisions are of assistance in the consideration of this particular ground of appeal.

In *Whitlaw v. The Phoenix Insurance Company* (1877), 28 U.C.C.P. 53, it was held that the keeping of a watchman upon the insured property was a matter material to the risk. There was a watchman upon the property when the insurance was placed but his employment had been discontinued some weeks before the fire which destroyed the property covered by the policy. The statement that a watchman was kept upon the property constituted a continuing warranty, the breach whereof avoided the policy.

In *Salata v. The Continental Insurance Company*, [1948] O.R. 270, 15 I.L.R. 38, [1948] 2 D.L.R. 663, in this Court, the insured declared in his application for a policy of fire insurance on a crop of tobacco stored in a barn that the barn was heated by oil-burning equipment. He, however, had installed a system burning coal and wood. Robertson C.J.O., who delivered the judgment of the Court, said that the equipment used in the building was, in the circumstances, important in estimating the risk and because there was a breach of statutory condition no. 1 the policy was void.

In the appeal of *The W. Malcolm Mackay Company v. The British American Assurance Company*, [1923] S.C.R. 335, [1923] 2 D.L.R. 506, a fire policy insuring lumber against loss by fire contained a clause by which it was warranted by the insured that a clear space of 300 feet would be maintained between the insured property and any standing wood, sawmill or other special hazard. Duff J. (afterwards C.J.C.) expressed the opinion that the meaning of the clause was that from the moment the contract was concluded, the clear space of 300 feet should be maintained and that such a clause introduced by the word "warranted" was in the nature of a condition precedent of the company's liability.

In the policies which are the subject of the present appeal, the clause in question is introduced by the words "Barn Warranties". Furthermore, the appellant agreed as a term of the



contracts that a failure to keep the barn warranties or any of them would render the policies null and void.

I agree with the finding of Mr. Justice Judson that it is manifest that the premium was affected or modified by the user of the insured property. The warranty (M) is not inconsistent with any statutory condition setting forth any stipulation in respect of the user of the property.

The second ground of appeal is also relevant to s. 113 of the Act. This section provides that a clause in a policy setting forth a stipulation as to the user of an insured property shall be binding on the insured in so far as it is held to be just and reasonable. For a number of years prior to 1924 a variation from the statutory conditions was permitted, provided the change was set out in a certain manner, and such a variation was valid unless held not to be just and reasonable. In 1924, by 14 Geo. V, c. 50, s. 96, the language of the section was changed. Stipulations, upon which the rate of premium was based, respecting the user of the insured property were permitted to form part of the policy and were valid unless held not to be just and reasonable. In the year 1927, by c. 59, s. 5, the present s. 113 was first enacted.

I agree with the opinion of the learned trial judge that the rules laid down in the earlier cases dealing with the section as it stood in former Insurance Acts, that is to say in statutes *in pari materia*, may serve as a guide and test in construing the words "just and reasonable" in the present section. Lord Coleridge C.J. said in *Barlow et al. v. Teal* (1885), 15 Q.B.D. 403 at 404:

"Whatever may have been the intention of the legislature we can only decide this case on general principles, and one of those general principles is, that where cases have been decided on particular forms of words, in Courts, and Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Acts shewing that the legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them."

These words "just and reasonable", as they stood in the Act dealing with insurance, were considered in former years by the Supreme Court of Canada in several appeals.

In *The City of London Fire Insurance Co. v. Smith* (1888), 15 S.C.R. 69, Gwynne J. said: "I do not see that any rigid rule can be laid down applicable to all cases as a test adequate to determine whether a variation of any of the statutory conditions is just and reasonable or not. . . . Every case must, as it appears to me, depend upon its own circumstances and the sound sense of those who are called upon to determine the question, and no rule can be laid down applicable to all cases."

In *The Anglo-American Fire Insurance Company v. Hendry et al.*; *The Montreal-Canada Fire Insurance Company v. Hendry et al.* (1913), 48 S.C.R. 577, 15 D.L.R. 832, it was held that the justness and reasonableness of a variation of, or addition to, a statutory condition must be determined according to the circumstances of the case in which it was sought to be applied.

In this Province the Courts have considered the words "just and reasonable" in connection with a variation sought to be made to a statutory condition, and reference has been made to some of these decisions by Mr. Justice Judson.

The rule is stated by a Divisional Court in *McKay v. The Norwich Union Insurance Company* (1895), 27 O.R. 251, to be that the reasonableness of a variation from the statutory conditions is to be decided with relation to the circumstances of each case at the time the policy is issued and not in the light of those existing at the time at which the condition is sought to be applied. There was evidence adduced in the present action to support the view that the clause now under consideration was just and reasonable at the inception of the policy and there is no doubt, in my view, that it is just and reasonable when the circumstances of the case are considered. As was said by Mr. Justice Gwynne in the Supreme Court of Canada in *The City of London Fire Insurance Co. v. Smith*, *supra*, "no rule can be laid down applicable to all cases".

Turning now to the third ground of appeal, that the learned trial judge erred in finding that the appellant left the steamer unattended, it was argued by counsel on his behalf that the clause or warranty relating to the steamer was concerned merely with an apparatus operated by coal or wood or oil, and had no application to one in which steam was created by the combustion of gas. The object or intention of the clause clearly is to obviate the danger of leaving a steamer unattended.

The construction which I place upon this clause is that no steamer of any type, in connection with which steam is generated by the combustion of any kind of fuel, will be left operating unattended either by day or by night. If steam is produced by burning coal or wood, the steamer will be banked before the operator leaves the building where it is located. If, on the other hand, steam is generated by burning oil, such oil shall be shut off at night and at such times as the operator is not present in the building.

The operation of the steamer by coal, wood or oil is not exclusive of some other means of creating heat in the steamer in so far as the obligation rests on the insured not to leave the steamer unattended while in operation. It is not set out in the warranty in question what shall be done to obviate danger from fire in the case of a steamer using some type of fuel other than coal, wood or oil, except that no steamer in operation, that is to say, in which steam is being generated by heat created in any manner whatsoever, shall be left unattended.

There is no question that the appellant, after he lighted the gas under the steamer on the day of the fire which destroyed the barn, left this building and proceeded to occupy himself with other duties in one of his other barns or stables, and that it was while he was so occupied that the fire started. This fact is established by the appellant's own evidence. I do not think that because an interval of only 15 minutes elapsed between the time when the appellant left the building in which the steamer was in operation and the time when the fire commenced, and because he was not far distant from the steamer, it can be held that this steamer was not unattended. It was not possible for the appellant while he was outside of the stripping-room or barn in which the steamer was situated to have any immediate control over it and it is the opportunity for constant control or supervision of the steamer by someone who is in or at the place where it is in operation that is aimed at by the warranty.

In *Ward v. Alliance Insurance Co. of Philadelphia* (1924), 55 O.L.R. 451, the insured, by a clause in the policy, in consideration of a reduction in the premium, warranted that his automobile would be equipped with a special locking-device, which would be used when the motor car, which was the property



insured, was left unattended. The car was left in a street unlocked and unattended for at least 5 minutes. It was held by Riddell J. that there was a breach of the warranty.

In *Jeanveaux and Legault v. The Prudential Assurance Company Limited*, [1947] O.W.N. 869, 14 I.L.R. 199, [1947] 4 D.L.R. 714, in this Court, the word "unattended", as it appeared in a policy insuring the owner of a motor car against loss by theft, was interpreted as meaning that no person remained in the motor car to "keep watch" over it. It is this meaning of the word "unattended" that must, in my opinion, be given to it in construing the warranty now before the Court.

Upon this branch of the appeal the appellant placed reliance upon the evidence of Mr. Michael Columbus, a licensed agent under The Insurance Act carrying on business at the town of Simcoe, who, in the course of his testimony, said that he had assured the appellant that "there is nothing in these warranties pertaining to gas steamers", and had told the appellant "all he had to do to comply with the contract, so far as this gas steamer was concerned, was to turn it off at nights and be sure to sweep out the barn".

This witness said the respondent company decided whether a policy should be issued when application for the same had been made, and that the policies with which this appeal is concerned came from the London, Ontario, branch-office of the company.

The contract between Columbus and the respondent company is dated the 8th May 1950, and appoints him a "non Recording Agent, at Simcoe, Ontario, for the purpose of canvassing for applicants for insurance risks, and doing such business as is usually performed by the Agent of an Insurance Company, according to the conditions of the Policies of the Company and to such instructions as have been and may from time to time be given to him by the Company". The further clauses in the agency contract refer to the compensation to be allowed to the agent and the care to be taken of the moneys received by him for the company. There is no term of this contract permitting the agent to issue policies of insurance or to alter a clause of warranty or condition contained in a policy, or to add a term to the policy. Nor, in my opinion, can such authority be inferred or implied. There is no evidence that instructions were ever given to the agent by which he was authorized to

alter a condition, clause or warranty of the policy. Furthermore, statutory condition 22 requires that the waiver of any condition shall be in writing. The first two of the three policies in question in this appeal contain the agreement of the appellant that no alteration in the barn warranties will be made without the consent of the respondent company in writing.

In *Torrop v. The Imperial Fire Insurance Company* (1890), 26 S.C.R. 585, it was held that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by the breach of a condition in the policy.

In *Salata v. The Continental Insurance Company, supra*, the agent of the insurance company filled in the answers in the application for the policy, which application was later signed by the applicant. It was submitted that the agent had knowledge of the situation, and that his knowledge was to be imputed to the company. Chief Justice Robertson said at p. 279: "It is to be borne in mind that Cowan, the agent, had no authority to make a contract for the respondent [the insurance company]. His authority was to solicit insurance."

I am of the opinion that Mr. Columbus had no authority to bind the respondent company by any interpretation which he might place upon a clause, condition or warranty in these insurance policies.

The conclusion arrived at by the learned trial judge that the appellant left the steamer unattended within the meaning of "Barn Warranty (M)", the steamer clause, and by so doing committed a breach of the warranty, should be affirmed.

Turning now to the last ground of appeal advanced by the appellant based upon the rule of evidence known as estoppel, it is contended that the respondent company is estopped from denying the truth of the statement made by its agent Columbus to the appellant that he (the appellant) need only turn off the steamer at night. It is argued that the appellant acted on the strength of this statement when he left the steamer after having lighted the gas, on the morning of the fire.

The law was to estoppel in relation to contracts of insurance is discussed by Riddell J.A. in *Teasdall v. Sun Life Assurance*

*Co. of Canada*, 60 O.L.R. 201, [1927] 2 D.L.R. 502. That learned judge adopted the language of Mr. Justice Field in the case of *Insurance Company v. Wolff* (1877), 95 U.S. 326 at 333, in the Supreme Court of the United States, where it was said:

"The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions."

In *Sragali v. The Capital Life Assurance Co. of Canada*, [1933] O.W.N. 506, [1933] 3 D.L.R. 798, the insured was told by an agent of the insurer company that the premiums due under the policy in question could be paid on terms different from those stated in the policy. Riddell J.A. said: "There is and <sup>can</sup> be no dispute that the contract of assurance cannot be amended by parol."

The applications and the policies issued in pursuance thereof constitute the entire contract between the appellant and the respondent. They contain the expressed intention of both parties. Apart, however, from the question of a parol alteration of the contract, I have already held that the agent had no authority whatever to bind the respondent company by any change he might purport to make in the policies.

There is present in this case nothing to justify a conclusion that there is any element of the character of waiver or estoppel which might bar the respondent company from setting up a breach of warranty by the appellant.

A further argument was advanced by counsel for the respondent company, which does not appear to have been submitted to the trial judge, based upon subs. 1 of s. 108 of The Insurance Act, statutory condition 7, and the judgment of this Court, delivered by Robertson C.J.O., in *Renshaw v. Phoenix Insurance Company of Hartford, Conn.*, [1943] O.R. 223, 10 I.L.R. 92, [1943] 2 D.L.R. 76. It is not necessary for the purposes of this appeal to consider this further argument.



I am of the opinion that, for the reasons given, the judgment should be affirmed and the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitor for the plaintiff, appellant: A. W. Winter, Simcoe.*

*Solicitors for the defendant, respondent: Fennell, McLean & Davis, Toronto.*

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[COURT OF APPEAL.]

**St. Catharines Flying Club v. The City of St. Catharines.**

*Aeronautics—Liabilities of Operators of Aerodromes—Dangerous Conditions near Landing-strips—Knowledge of Officials of Flying Club—Damage to Aircraft—The Air Regulations, 1948, Part III, s. 2—The Aeronautics Act, R.S.C. 1927, c. 3, s. 19, as enacted by 1944, c. 28, s. 6.*

An aircraft belonging to the plaintiff club was damaged as a result of colliding in landing with some bales of hay that had been left lying near the landing-strip by the defendant municipality, lessee from the Crown of the aerodrome. The aircraft was then being flown by a student pilot, whose flight had been authorized by the chief flying instructor of the club. Both the chief flying instructor and the student pilot knew of the presence of the hay.

*Held*, the plaintiff was not entitled to recover.

There was no absolute duty on the defendant to maintain all approaches to the landing-strips free from obstructions. There was no statutory provision imposing such a duty, and s. 2 of Part III of The Air Regulations, 1948 (which had statutory authority by virtue of s. 19 of The Aeronautics Act) appeared to contemplate the imposition of conditions, not by way of regulation but in licences to be issued for aerodromes, and here there was no evidence as to the contents of the defendant's licence. It was true that such an obligation was imposed on the defendant in its lease from the Crown, but that was binding only between the parties to the lease and had in itself no statutory effect.

Further, so far as the evidence revealed the plaintiff could be placed in no higher position than that of a licensee on the landing-strips and approaches, and the defendant's only duty to it was not to expose it to a concealed danger or trap known to the defendant and not known to the plaintiff. The danger here was not a concealed one, nor was it in the nature of a trap, and the chief flying officer (who was also the principal executive officer of the plaintiff club) authorized the flight freely and with full knowledge of the danger, and this made applicable the maxim *volenti non fit injuria*. Alternatively, if the chief flying officer did not appreciate the nature and extent of the risk he was negligent in failing to do so, and this negligence was subsequent to and severable from the act of the defendant in allowing the bales of hay to remain, so as to constitute, at least as between the parties, the sole effective cause of the damage.

Since the student pilot involved was not a party to the action, no finding of negligence should be made against him; the Court was concerned only with the respective responsibilities, if any, of the parties to the action: *Bennetto et al. v. Leslie and Werby*; *Sykes v. Leslie and Werby*, [1950] O.R. 303.

AN APPEAL by the plaintiff from the judgment of Darby Co. Ct. J., dismissing the action on a motion by the defendant for nonsuit.

10th and 11th March 1953. The appeal was heard by ROACH, AYLESWORTH and GIBSON JJ.A.

*B. J. MacKinnon*, for the plaintiff, appellant: The trial judge, having found that the defendant was under a statutory duty to keep the runways clear, erred in holding that the plaintiff could in effect consent to a breach of that duty. The defence of *volenti non fit injuria* is not available in such a case: *Greer v. Township of Mulmur*, 59 O.L.R. 259, [1926] 4 D.L.R. 132.

The learned trial judge also erred in holding that the student pilot was negligent because he continued to fly after he knew of the defendant's breach of its statutory duty: *Hesketh v. Liverpool Corporation*, [1940] 4 All E.R. 429; Salmond on Torts, 10th ed. 1945, p. 37; *Clayards v. Dethick and Davis* (1848), 12 Q.B. 439, 116 E.R. 932. There is no evidence to support a finding of negligence on the part of the pilot; at the worst he was guilty of an error in judgment, and this argument does not depend on the existence of a statutory duty: *Clayards v. Dethick and Davis*, *supra*.

Even assuming that there is evidence of some negligence on the part of the pilot, contributing to the accident, the learned trial judge erred in applying the exploded doctrine of identification; the plaintiff cannot be identified with the negligence of the pilot: Shawcross and Beaumont, *Air Law*, 2nd ed. 1951, p. 527; *Johnson and Baird v. Central Aviation Corp. and Gross*, 1951 U.S. Av. R. 241; *Olsen et al. v. Corry and The Gravesend Aviation Ltd.*, [1936] 3 All E.R. 241 at 247. The pilot had the aircraft under a contract of bailment and there is no evidence to establish a relationship of master and servant or one of agency between him and the plaintiff. The onus of establishing such a relationship is on the defendant.

The doctrine of last clear chance or ultimate negligence can have no application in the case of an innocent third party such as the plaintiff: *Grant v. Sun Shipping Company Limited et al.*, [1948] A.C. 549 at 561, [1948] 2 All E.R. 238.

*J. S. Beatty, Q.C.*, for the defendant, respondent: The pilot, a member of the plaintiff club, flying under the sanction of its chief flying officer, was not a mere bailee *qua* the club.

The chief flying officer himself should have foreseen that the student pilot, in the circumstances, would possibly overshoot the runway, and his negligence is therefore the cause of the accident.

I refer to the following cases: *Greunke v. North American Airways Company*, 1930 U.S. Av. R. 126; *Read v. New York City Airport, Inc. et al.*, 1933 U.S. Av. R. 31; *Tiedt v. Gibbons et al.*, 1940 U.S. Av. R. 63.

*B. J. MacKinnon*, in reply.

*Cur. adv. vult.*

25th March 1953. The judgment of the Court was delivered by

AYLESWORTH J.A.:—This appeal is taken from the judgment of His Honour Judge Darby, of the County Court of the County of Lincoln, dated 12th June 1952, whereby the plaintiff was non-suited and its action was dismissed with costs.

The action arose by reason of an accident which occurred on 6th July 1951, on the aerodrome held by the respondent under lease from His Majesty in the right of the Dominion of Canada, damaging one of appellant's aircraft. On that day, or at some time in the few days immediately preceding, respondent had caused the hay growing around the landing-strips on the aerodrome property to be cut and subsequently to be baled. Some 12 to 15 bales were left lying a few feet from the westerly end of landing-strip no. 3 on the most westerly approach thereto. The accident occurred at approximately eight o'clock in the evening. According to appellant's chief flying instructor, the bales of hay had remained on the landing-strip approach "all afternoon". On the evening in question a student pilot, one Stoner, a member of the appellant flying club, had rented one of the appellant's aircraft and was making solo circuits and "forced landings" as authorized by appellant's chief flying instructor, who also was appellant's chief administrative officer. The pilot had 20 hours of flying to his credit. On his second landing he overran the landing-strip on to its western approach, and the aircraft came into collision with the bales of hay and was damaged. Landing-strip no. 3 stretches in an east-west direction and the rays of the setting sun reflected on the windshield of the aircraft when the student pilot was in the act of coming down for his landing, causing or helping to cause him to misjudge his position over the landing-strip so that he actually "touched down" some two-thirds of the distance along the strip. When the pilot realized his position on the landing-strip, he was faced with two alternatives, namely, either to accelerate and carry or attempt to carry



his plane aloft for another circuit or to attempt to arrest his plane's progress on the ground so as to stop short of the bales of hay. He, too, knew of the presence of the bales of hay near the end of the landing-strip. Both he and the flying instructor knew that the direction of the prevailing wind required aircraft to be landed on landing-strip no. 3 from east to west in the direction of the setting sun.

The trial judge in granting respondent's motion for nonsuit held that the placing of the obstruction, *i.e.*, the bales of hay, on the westerly approach to the landing-strip was only a *causa sine qua non* and that the sole and effective cause of the accident was the negligence of the student pilot. Later, in his reasons, he seems to place the responsibility for the accident, in part at least, on the flying instructor. The student pilot is not a party to the action and I do not think that even if his negligence, if any, did cause or contribute to the accident it is proper that any finding be here made against him; it is the respective responsibilities, if any, of the parties to the action which alone must be considered: *Bennetto et al. v. Leslie and Werby; Sykes v. Leslie and Werby*, [1950] O.R. 303.

However, I think the result arrived at by the trial judge is correct and that the action was properly dismissed. The trial judge held the view that there was an absolute duty on the respondent to maintain all approaches to the landing-strips free of all obstructions. Upon the record before us in this particular appeal, I cannot so find. Counsel for the appellant in his presentation of the appeal laid much stress upon the finding at trial in this respect and referred the Court to a covenant entered into by the respondent as lessee in the lease from the Crown which appears as ex. 1. He also referred to The Aeronautics Act, R.S.C. 1927, c. 3, as amended by 1945, c. 9, and to The Air Regulations, 1948, as published in Part II of The Canada Gazette dated 9th June 1948 ([1948] S.O.R. 1348).

Covenant numbered 10 in the lease of the aerodrome, ex. 1, reads as follows: "That the Lessee shall at all times during the currency of this lease, maintain the said Aerodrome in a serviceable condition for operation as a public aerodrome under a licence granted pursuant to The Air Regulations, 1938, and amendments thereto, such maintenance to include maintenance of all approaches to the landing strips free of

all obstructions to the operation of aircraft and in accordance with regulations in effect from time to time respecting the said Aerodrome, and in all respects to the entire satisfaction of the Minister and at the expense of the Lessee."

This provision by itself is binding between the immediate parties to the instrument, but taken by itself it has no statutory effect. The only relevant provision of The Air Regulations to which we were referred or which I can find appears as Regulation numbered 2 in Part III of such Regulations and it reads as follows: "Licenses to airports may be issued by the Minister and may be made subject to such conditions respecting the aircraft which may make use of the airport, the maintenance thereof, the marking of obstacles in the vicinity which may be dangerous to flying and otherwise, as the Minister may direct."

It is true that s. 19 of The Aeronautics Act, as enacted by 1944, c. 28, s. 6,\* provides that all regulations enacted under the provisions of that Act shall be published in The Canada Gazette and upon such publication the regulations shall have statutory effect, but the regulations themselves, particularly as evidenced by the regulation I have quoted, appear to contemplate merely the imposition of "conditions" respecting the maintenance of aerodromes, not by way of regulation but by insertion in a licence to be issued by the Minister of Transport. No licence was adduced in evidence and therefore I am quite unable to find on the record before us that there is any statutory duty upon the respondent.

I might add that condition or covenant 15 in ex. 1 provides that the respondent shall, before using the demised premises, obtain a licence under The Air Regulations, but even if we are to presume that it in fact obtained a licence, we do not know what "conditions", if any, appear therein.

Again, so far as the record in this action reveals, the appellant can be placed in no higher position than a licensee of the landing-strips and the approaches thereto. Exhibit 4 is a lease bearing the same date as ex. 1 and between the same parties. It recites that the respondent lessee "is acting on behalf of the St. Catharines Flying Club, Limited" and has made application to the lessor for a lease of certain lands to be used by the flying

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\* See now The Regulations Act, 1950 (Can.), c. 50, repealing (by s. 10) s. 19 of The Aeronautics Act, as of 1st January 1951, which was not drawn to the attention of the Court on the argument of this appeal.

club in connection with the aerodrome for the purpose of providing instruction in civil aviation. Covenant numbered 16 of that lease seems to contemplate the possibility of the appellant assuming the lease, but there is no evidence before us that it ever did assume the lease or that it pays anything to the respondent for its use of the aerodrome property. These facts, then, would seem, as I have said, to constitute appellant a licensee of the premises and respondent's duty to appellant is therefore limited in the usual manner consequent upon that relationship of the appellant, namely, not to expose appellant to a concealed danger or trap unknown to appellant but known to the respondent. The danger here, namely, the presence of the bales of hay upon the approach to landing-strip no. 3, was not a concealed danger and not one in the nature of a trap. On this ground alone the appellant fails.

The chief flying instructor of the respondent says that he did not anticipate any danger from the bales of hay. He is a licensed pilot of the instructor category with 3,500 flying hours to his credit. It was his duty to authorize any flights to be made by the student pilot. He knew the number of flying hours to the credit of the student pilot. He knew that pilot was taking off to practise forced landings. He knew that landing-strip no. 3 would have to be used for take-off and landing; that the bales of hay were at the end of that landing-strip, and that to land his aircraft the pilot would be required to bring his plane on to the landing-strip in motion toward the position of the bales of hay and into the rays of the setting sun. I view these circumstances as being of such a cogent nature as to make the danger so apparent that the flying instructor's statement ought to be disregarded and that it should be held that he authorized the unfortunate flight freely and with full knowledge of the danger of damage to the aircraft: *volenti non fit injuria*. Alternatively, even if the flying instructor in fact did not appreciate the nature and extent of the risk, I think he ought to have done so and that if he did not he was negligent. That negligence occurred at such a time subsequent to the act of the respondent in permitting the bales of hay to remain where they were and in such conditions as to be entirely severable from the act of the respondent and as to constitute, at least as between the parties, the sole effective cause of the damage.



On all of the above grounds, therefore, I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Slaght, McMurtry, Ganong, Keith & Slaght, Toronto.*

*Solicitor for the defendant, respondent: George W. Gardhouse, Toronto.*

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[McRUER C.J.H.C.]

[COURT OF APPEAL.]

**McMillen v. Chapman and S. S. Kresge Company Limited.**

*Contracts — Rectification — Conditions of Action by Court — Necessity for Showing either that Document Does not Represent True Agreement of Parties or Unilateral Mistake Such that Action on it by Other Party Constitutes Fraud — Lease of Land — Provision for Termination.*

*Contracts — Form — Requirement of Writing — Part Performance as Answer to Plea of The Statute of Frauds, R.S.O. 1950, c. 371, s. 4 — Necessity that Performance be Referable only to Alleged Agreement.*

M and C agreed orally for a five-year lease of land from C to M, and M agreed to have a written lease prepared by his solicitor. In instructing the solicitor M told him to insert a clause giving M a right to terminate the lease on 90 days' notice in writing, his intention being to see whether C would accept such a clause and, if he would not accept it, to strike it out before execution. By a mistake in the solicitor's office the clause was so drawn as to give the right of termination to the lessor rather than the lessee, and the lease was executed by the parties in this form, C understanding the clause and being satisfied with it, and M being mistaken as to its effect. C later agreed to sell the property, and gave the required notice to M, who then brought this action for rectification and other relief.

*Held*, the action must fail, and C was entitled to a declaration, as asked in his counterclaim, that the notice of termination was effective.

As to rectification, it was not established that the written lease did not represent the true agreement of the parties. *Ship "M.F. Whalen" v. Pointe Anne Quarries Limited* (1921), 63 S.C.R. 109 at 126-7; *United States of America et al. v. Motor Trucks, Limited*, [1924] A.C. 196 at 200, quoted and applied. There was no evidence whatever that C had agreed that M should have the right to terminate the lease, which would be necessary to justify the Court in transposing the words "lessor" and "lessee". Nor could the plaintiff succeed on the ground of unilateral mistake, since the mistake was not of such a character that it would be obvious to C, and that his taking advantage of it would amount to a fraud. C was entitled to accept the offer of the written lease as tendered. *May v. Platt*, [1900] 1 Ch. 616 at 623; *Blay v. Pollard and Morris*, [1930] 1 K.B. 628 at 633; *Paget v. Marshall* (1884), 54 L.J. Ch. 575, quoted and applied. To rectify the lease by deleting the clause entirely would be to reconstruct a written document that was not in the mind of either party.

M could not succeed on his alternative claim to have the written lease set aside, and for a declaration that he had been in possession throughout under an oral lease for five years. The defendant had

pleaded The Statute of Frauds, which was a complete answer to this claim. The allegation of part performance, set up in answer, could not succeed, since the conduct of the parties was not referable to an alleged oral lease, but to the written lease as each understood it. M was either a tenant under the written lease or a tenant at will, and in either event the notice was sufficient to terminate the tenancy. In the circumstances, C was the person entitled to give the notice to quit, since he had not sold the property, but only agreed to sell it, and consequently had not parted with the title. *Canadian Perfect Garment Company Limited v. Bell*, [1948] O.W.N. 749, distinguished.

AN ACTION for rectification of a lease, and for other relief.

17th and 18th December 1952. The action was tried by McRUER C.J.H.C. without a jury at Toronto.

*R. F. Wilson, Q.C.*, for the plaintiff.

*W. E. P. DeRoche*, for the defendant Chapman.

*A. S. Pattillo, Q.C.*, and *W. O. C. Miller*, for the defendant company.

18th December 1952. McRUER C.J.H.C. (orally):—For some time prior to the 14th November 1951 the plaintiff, a dealer in builders' supplies, occupied premises owned by the defendant Chapman at 42 Lawrence Avenue West in the town of Weston as a monthly tenant paying rent at the rate of \$225 per month. About the 14th November 1951 the plaintiff and the defendant discussed the matter of a lease.

The plaintiff suggested a two-year lease and Mr. Chapman proposed a five-year lease if the plaintiff would pay \$250 per month. This was agreed to by both parties. Mr. Chapman said he would have his solicitor draw up the lease, and after waiting for two or three days, because his solicitor was not available the plaintiff spoke to him and suggested that he would get his solicitor to draw the lease, and that it would not cost Mr. Chapman anything.

The plaintiff then instructed a solicitor practising in the city of Toronto to prepare a lease of the premises. The plaintiff's evidence is that he told the solicitor to draw a lease for five years at \$250 per month, and to insert a clause in the lease giving the plaintiff the right to terminate it on three months' notice if the plaintiff's business should "go bad or fall down", to use his own words. The solicitor prepared the lease and he inserted in it the following clause:

"And it is further understood and agreed by and between the Lessor and the Lessee that if the Lessor, because of unsatisfac-

tory business conditions or for any other reason, shall desire to do so, he shall have the right, notwithstanding anything herein contained, to terminate this lease and the term hereby granted, by giving notice in writing to the Lessee of the termination thereof at the expiration of ninety (90) days from the giving of such notice and at the expiration of such period this lease and the term hereby created shall be ipso facto terminated and the Lessee shall thereupon surrender and deliver up possession of the demised premises to the Lessor."

The solicitor states that he dictated the clause in question to his secretary but that she made a mistake and transposed the words "lessor" and "lessee".

Whether it was a mistake in dictation or the secretary's mistake, I am convinced that there was a mistake and that it was not intended by the plaintiff that the clause should read in the form that it does, but that it was intended that he should have the right to terminate the lease on 90 days' notice under the conditions set out in the clause. However, his evidence is that this matter was not discussed with Mr. Chapman and that he told the solicitor to put the clause in and if Mr. Chapman did not agree to it they could take it out.

The lease was drawn in the form in which it appears and two copies were given to Mr. Chapman, who took the lease as drawn to his solicitor, Mr. Gardhouse, who looked it over, and between them they considered it satisfactory. Mr. Chapman and Mr. McMillen together then signed the lease under seal.

Mr. Chapman's evidence is that on reading the clause over he took it that it was giving him a right to terminate the lease on the conditions set out, on 90 days' notice, and he could see no objection to that. Mr. McMillen's evidence is that he did not read the lease and did not see the effect of the clause. I think the reasonable conclusion is that he did not realize the effect of the clause when he signed the lease.

Each party took an executed copy and no question arose for some time. Mr. McMillen remained in possession and paid rent at the rate of \$250 per month. In July 1952 Mr. Chapman was approached by Mr. de Mara, an agent for S. S. Kresge Company Limited, with a view to negotiating a purchase of the property on behalf of the Kresge company. An option was taken on the



property and attached to the option were an agreement for sale, a surveyor's sketch and a photostatic copy of the lease.

The option was exercised on the 16th July and the contract provided that the sale should be closed 30 days after the acceptance of the option. Attached to the contract was a covenant on behalf of the vendor that upon the written request of the purchaser subsequent to the exercise of the option he would give notice in writing to the lessee of the termination of the lease in accordance with its terms, "the form of notice and manner of service thereof to be subject to the approval of the Purchaser's solicitor".

A notice was prepared by the purchaser's solicitors and given to Mr. Chapman to serve on Mr. McMillen. This notice is dated the 27th August 1952, and was served on that date. Following three recitals, the notice reads: "NOW THEREFORE I hereby give you notice in writing of the termination of the said lease on the expiration of ninety days from the giving of this notice and, on the expiration of such period, the said lease and the term thereby created shall be ipso facto terminated and you shall thereupon surrender and deliver up possession of the demised premises to me."

Upon this notice coming to Mr. McMillen's attention he naturally became disturbed and took legal advice, following which this action was brought on the 9th September 1952.

In the statement of claim as originally framed the plaintiff asked that the clause in the lease be rectified, so that the words "lessor" and "lessee" should be transposed to give the power of termination of the lease to Mr. McMillen, the tenant, rather than to Mr. Chapman, the landlord. An alternative claim was made that the lease be rectified by deleting the clause in its present form from the lease. The effect of that would be to give to the plaintiff a five-year lease with no power of termination vested in either party.

The prayer also claims a declaration that the notice of termination of the lease given by the defendant Chapman to the plaintiff is null and void, and a declaration that the defendant Kresge company purchased the premises subject to the lease as rectified by giving it its intended meaning.

There are claims for an interim injunction and damages against Mr. Chapman, which are not pressed.

By amendment to the statement of claim there is a further alternative claim for relief, which reads as follows: "In the alternative, the plaintiff says that in any event he entered into an oral lease with the defendant Chapman on or about the 14th day of November, 1951, of the said premises for a term of five years beginning on the 15th day of November, 1951, at a rental of \$250.00 per month, and the plaintiff has been in possession and occupation of the said premises since the 15th day of November, 1951, and has been paying the defendant Chapman the said rental of \$250.00 a month." On the basis of this claim the plaintiff asks a declaration that the plaintiff is lawfully in possession of the premises under the oral lease referred to. With respect to this last claim the defendant Chapman denies an oral lease and pleads The Statute of Frauds, R.S.O. 1950, c. 371.

The authorities and cases on the subject of rectification of contracts are very numerous, and I can see no useful purpose in reviewing them in great detail. The first general principle to be applied is that the party claiming rectification of a contract must prove a binding agreement between the parties which has not been truly expressed in the written document.

Duff J. (later C.J.C.) in *Ship "M. F. Whalen" v. Pointe Anne Quarries Limited* (1921), 63 S.C.R. 109 at 126, 63 D.L.R. 545, affirmed [1923] 1 D.L.R. 45, lays down with clarity the principles to be applied. He says: "First, it must be shown not only that the agreement as stated in the writing . . . was not the whole of the agreement between the parties, and it must further be shown that the parties did agree upon something which did not appear in the writing . . . and that the agreement, that is to say the intention to contract in this sense, continued concurrently in the minds of both parties down to the time the document went into operation."

The second principle he refers to is at p. 127: "The other condition relates to the character and probative force of the evidence required. Where one of the parties denies the alleged variation the parol evidence of the other party is not sufficient to entitle the court to act. Such parol evidence must be adequately supported by documentary evidence and by considerations arising from the conduct of the parties satisfying the court beyond reasonable doubt that the party resisting rectification did in truth enter into the agreement alleged. It is not sufficient that

there should be a mere preponderance of probability; the case must be proved to a demonstration in the only sense in which in a court of law an issue of fact can be established to a demonstration, that is to say, the evidence must be so satisfactory as to leave no room for such doubt." And reference is made to *Hart v. Boutillier* (1916), 56 D.L.R. 620; *Fowler v. Fowler* (1859), 4 DeG. & J. 250, 45 E.R. 97, and *Clarke v. Joselin* (1888), 16 O.R. 68.

The judgment of the Earl of Birkenhead in *United States of America et al. v. Motor Trucks, Limited*, [1924] A.C. 196 at 200, [1923] 3 D.L.R. 674, bears on this branch of the case:

"It was further suggested that the present action involved an attempt to enforce a parol contract inconsistently with the principle of the Statute of Frauds. It is, however, well settled by a series of familiar authorities that the Statute of Frauds is not allowed by any Court administering the doctrines of equity to become an instrument for enabling sharp practice to be committed. And indeed the power of the Court to rectify mutual mistake implies that this power may be exercised notwithstanding that the true agreement of the parties has not been expressed in writing. Nor does the rule make any inroad upon another principle, that the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified; and secondly, that such an agreement has been inaccurately represented in the instrument. When this is proved either party may claim, in spite of the Statute of Frauds, that the instrument on which the other insists does not represent the real agreement. The statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on; but when the written instrument is rectified there is a writing which satisfied the statute, the jurisdiction of the Court to rectify being outside the prohibition of the statute."

The cases governing rectification are reviewed extensively in Pollock on Contracts, 13th ed. 1946, pp. 412 *et seq.*

In order to grant the plaintiff's prayer for relief that the lease be rectified by transposing in the clause in question the words "lessor" and "lessee", it would be necessary for me to find that Mr. Chapman had agreed that the plaintiff was to have the right to terminate the lease on the terms set out in the clause. There is not a suggestion of evidence on which I could base such



a finding. The plaintiff himself says that this matter was not discussed between him and Mr. Chapman.

The first suggestion of a clause giving any right to terminate the lease was when the written document was given to Mr. Chapman and he read it over in the form in which it was when they both signed it. There was no mutual mistake whatever. Mr. Chapman accepted the lease as drawn by the plaintiff's solicitor, and while there was a clause that was advantageous to him he was willing to accept it, and I think he did so in perfect good faith.

That brings me to the next question, whether there was a unilateral mistake. In order to obtain rectification on the ground of unilateral mistake it must be shown that the mistake was of such a character that it would be obvious to the other party, and that his taking advantage of it would amount to fraud or misrepresentation amounting to fraud.

In *May v. Platt*, [1900] 1 Ch. 616 at 623, Farwell J. states the law in this way: "In my judgment, in order to get rescission after conveyance, the allegations would have had to be very different. I have always understood the law to be that in order to obtain a rectification there must be a mistake common to both parties, and if the mistake is only unilateral there must be fraud or misrepresentation amounting to fraud. It is true that Lord Romilly in *Harris v. Pepperell*, L.R. 5 Eq. 1, and *Garrard v. Frankel*, 30 Beav. 445, 54 E.R. 961, and perhaps Bacon V.-C. in *Paget v. Marshall*, 28 Ch. D. 255, appear to have shrunk from stigmatising the defendants' conduct in terms as fraud, but they treated it as equivalent to fraud, and in my opinion would have no jurisdiction to grant the relief that they did in the absence of fraud."

In *Blay v. Pollard and Morris*, [1930] 1 K.B. 628 at 633, Scrutton L.J. refers to the judgment of Lord Romilly in *Powell v. Smith* (1872), L.R. 14 Eq. 85, and he says: "As a general rule mistake as to the legal effect of what you are signing, when you have read the document, does not avail . . . It would be very dangerous to allow a man over the age of legal infancy to escape from the legal effect of a document he has, after reading it, signed, in the absence of an express misrepresentation by the other party of that legal effect. For these reasons, in my opinion, the defence of non est factum, if pleaded, cannot succeed."

But he goes on then to deal with the second defence and quotes from Fry on Specific Performance, s. 792, as follows: "It equally follows that the mistake of one party to a contract can never be a ground for compulsory rectification, so as to impose on the second party the erroneous conception of the first. The error of the plaintiff alone may, however, where (but, it is conceived, only where) there has been fraud or conduct equivalent to fraud on the part of the defendant, be a ground for putting the defendant to elect between having the transaction annulled altogether or submitting to the rectification of the deed in accordance with the plaintiff's contention."

In *Paget v. Marshall* (1884), 54 L.J. Ch. 575, Bacon V.C. dealt with it in this way: "The other class of cases is one of what are called unilateral mistakes, and there, if the Court is satisfied that the true intention of one of the parties was to do one thing or omit to do one thing, and he by mistake has signed an agreement to do another thing, that will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into. That I take to be the clear conclusion to be drawn from the authorities."

It seems to me that these cases put the plaintiff in this difficulty: In the first place, there is no mutual mistake. In the second place, if there is a unilateral mistake the plaintiff cannot seek to take advantage of that mistake unless there was some improper conduct on the part of Mr. Chapman. That I cannot find in the circumstances. He was entitled to accept the offer of the written lease as tendered. The plaintiff's intention was to offer him a written lease that was not consistent with their verbal understanding and see if he would accept it. Erroneously the plaintiff offered him a written lease—or, I may say, through the error of his solicitor the plaintiff offered Mr. Chapman a written lease—in the terms in which it was, and he accepted it. I can see no ground for rectification.

If the lease is not rectified, then what position is the plaintiff in? I think under the authorities he has either the lease as written or no lease at all. There is not any ground for claiming to have the written document rectified by deleting the clause in question, because the parties were not agreed on a written document of that character at the time it was signed. The plaintiff

had in his mind a written document that would give him a right to terminate the lease on 90 days' notice; while, on the other hand Mr. Chapman had in his mind a written document that gave him the right to terminate the lease on 90 days' notice under the circumstances set out in the clause. Therefore, if I deleted the questioned clause from the written document I would be reconstructing a written document that was not in the mind of either of the parties at the time it was signed. Therefore, that alternative claim fails.

This brings me then to the claim that the lease should be set aside and that I should find that there was no meeting of minds on the written document but that there was an oral agreement.

The parties had arrived at an early agreement that Mr. Chapman would give a lease for five years and that he would have his lawyer draw up a written lease. Mr. McMillen was not satisfied with that, and he undertook to try to change the terms on which they had agreed, and the terms on which they had agreed were changed as far as Mr. Chapman was concerned to embody the oral agreement plus a term giving a right to him to determine the lease on 90 days' notice.

I do not think that in these circumstances I can rescind all that had taken place at Mr. McMillen's instance giving rise to this confusion and say the parties are then back where they were when they agreed to the terms that were to be embodied in a written lease.

Even if I am wrong in that, I do not think that is the end of the plaintiff's difficulty. The Statute of Frauds is pleaded and the only answer to the plea of The Statute of Frauds is that there was part performance of the oral agreement. Is that true? Neither of the parties had in his mind part performance of the oral agreement when Mr. McMillen paid rent and when Mr. Chapman accepted the rent. When Mr. McMillen paid rent he was paying rent on the strength of the lease as he had conceived it to be; when Mr. Chapman accepted the rent he was accepting the rent on the basis on which he conceived it to be. When Mr. McMillen remained in possession he was not in possession under an oral lease, and his mind was not directed to an oral lease. He was in possession under a written lease as he conceived it to be; and when Mr. Chapman allowed him to remain in possession he was allowing him to remain in possession under the lease as it



was submitted to him for signature. I cannot see how the payment of rent and remaining in possession can be part performance of an oral agreement that neither party had in contemplation during the alleged part performance. The part performance must be referable to the oral agreement that is relied on, and here it was not. I think The Statute of Frauds is a complete answer to the allegation of an oral agreement.

It is contended that the form of the notice to quit is not sufficient to be effective. Mr. Wilson relies on *Canadian Perfect Garment Company Limited v. Bell*, [1948] O.W.N. 749, [1948] 4 D.L.R. 816, and as I conceive his contention it is this: that Mr. Chapman, having entered into a valid agreement for the sale of the property, had no personal interest in giving a notice to quit, and that was a power vested in him personally. He points out that the power does not extend under the lease to the lessor's assigns. To give effect to this argument I think I would have to hold that Mr. Chapman is not the landlord at the present time. Someone has the right to give a notice to quit if the lease is valid. If it is not valid, then there is no lease and the plaintiff is either a tenant from month to month or a tenant at will. In these circumstances who could give the notice to quit except Mr. Chapman? In addition, he has the fee in the property; he has only agreed to sell it. The agreement for sale refers to the lease in question and this action has been pending to determine what the rights of the parties are under the lease. Until Mr. Chapman has done more than enter into an agreement to sell the property, I think he has the power and the right to give notice to quit. It may be that he desires that the plaintiff should vacate so that the Kresge company will carry out the sale. That is a perfectly good reason why he should wish to give the notice even if it is a personal covenant with him. I fail to see any sound basis for holding that the notice to quit is not effective.

The plaintiff's action will therefore be dismissed with respect to all claims contained in the statement of claim.

The defendant Chapman counterclaims against the plaintiff for a declaration that the notice of termination of the lease given to the plaintiff is valid and of full effect. The defendant should have a declaration accordingly.

There is a further claim for a declaration that the plaintiff shall pay rent to the defendant at double the rental value of the

premises for the period of holding over, commencing 25th November 1952. I do not think that a claim is made out for double rental of the premises. In the circumstances I do not think the plaintiff has been wilfully overholding. He has had a case of some difficulty, far from a frivolous and vexatious one, pending before the Courts for a determination of his rights. The only order that should go is that he should pay occupation rent at the rate of \$250 per month. There should be an order that he deliver up possession of the premises, and I think in the circumstances I should fix a reasonable date. I will discuss that with counsel.

There is a further claim for \$5,000 damages. There has been no evidence that would justify me in giving judgment for damages as claimed in the counterclaim.

[A discussion followed as to the date for delivery of possession.]

*Judgment accordingly.*

The plaintiff appealed from this judgment.

25th March 1953. The appeal was heard by PICKUP C.J.O. and HOGG and F. G. MACKAY JJ.A.

*R. F. Wilson, Q.C.*, for the plaintiff, appellant: [PICKUP C.J.O.: Is it a fact that before the discussions leading up to this written lease the plaintiff was in possession of the entire premises under a lease for one year as a monthly tenant?] Yes. The plaintiff's solicitor prepared the written lease because of the absence of the defendant's solicitor. [MACKAY J.A.: There was an oral agreement to enter into a written lease for five years, which is a different thing from an oral lease for five years.] There was no question that there was to be a five-year term and that the rent was to be \$250 a month. The sole question is as to the plaintiff's present legal position. I do not rest my case on mutual mistake. There is evidence in the record to support an inference that the defendant Chapman did not know, when the lease was executed, of his right under it to terminate it on 90 days' notice. I accept the trial judge's findings of fact, but he made no finding in respect of this inference. [MACKAY J.A.: What do you say is the meaning of the words "for any other reason" in the clause permitting the giving of notice?] It con-

templates that some reason must be given. Here the defendant gave no reason.

The right to give notice was a personal right in Chapman, and had been lost by his agreement to sell to the Kresge company: *Pepper v. Butler* (1875), 37 U.C.Q.B. 253; Williams on Vendor and Purchaser, 4th ed. 1936, pp. 59, 545-6; *Thompson v. McCullough*, [1947] K.B. 447, [1947] 1 All E.R. 265; *Canadian Perfect Garment Company Limited v. Bell*, [1948] O.W.N. 749, [1948] 4 D.L.R. 816. [MAC KAY J.A.: If Chapman had assigned the lease instead of selling the property, could the assignee not have given the notice?] No; it is a personal right. [MAC KAY J.A.: He still had the legal title and the right to collect rent.] Yes. [MAC KAY J.A.: Did your client ever ask what the reason was for giving notice? If not, would he not now be estopped? He received a notice pursuant to the lease, and accepted it although no reason was stated. How can he now take advantage of that omission?] The sale to the Kresge company is only executory; it has never been completed. The principles applicable to a purchaser for value without notice cannot apply here.

[PICKUP C.J.O.: Your whole case is that on the findings of fact this document is not binding on either party, and that accordingly the purported termination of the tenancy pursuant to the document is not effective?] [MAC KAY J.A.: I should think that if the document did not become effective you were in the position of a tenant at will.] We must go back to the position of the parties before the execution of this document. There was an agreement for a tenancy for five years at an agreed rental. [PICKUP C.J.O.: But that agreement would be unenforceable because of The Statute of Frauds, R.S.O. 1950, c. 371, unless you could show part performance referable to the agreement.] There was a change in the rent at that time, and after the agreement was made we paid rent at the new rate. [MAC KAY J.A.: But you were not occupying under the oral agreement; you were occupying under the written lease as you thought it was.]

The defendant Chapman was guilty of constructive fraud in acting on the clause in question. He should be in no better position than a man who during negotiations says: "Let's try it; if they object we can take it out." [PICKUP C.J.O.: It comes down to the question whether the landlord realized that this clause was



the result of a mistake and took advantage of it, and on that you have a finding of fact by the trial judge that the landlord acted in good faith.] I challenge that finding. It is a question of what is meant by good faith, and I refer to *Bourgeois v. Smith* (1921), 48 N.B.R. 212, 58 D.L.R. 515. If the Court in the exercise of its equitable jurisdiction gives Chapman the option of retaining or rejecting the written lease, and he elects to reject it, then I submit that having regard to the part performance we are either (a) a tenant under the oral lease for five years from 15th November 1951 or (b) a tenant from year to year: *Walsh v. Lonsdale* (1882), 52 L.J. Ch. 2; 20 Halsbury, 2nd ed. 1936, pp. 47-49, paras. 51, 52. [MACKEY J.A.: If you wipe out the written lease, how can you say that you were paying rent under the oral lease? That was not the understanding.] If the written lease is wiped out we get back to the oral agreement for a five-year tenancy at a rental of \$250 a month. The parties were *ad idem* about that.

The trial judge, by upholding the validity of the notice and declaring that Chapman was entitled to possession forthwith, has in effect given Chapman specific performance. The principles applicable to specific performance in a case of this kind are different from those applicable to rectification, and the Court can refuse specific performance on the basis of mistake, even where rectification cannot be ordered: *Kerr on Fraud and Mistake*, 6th ed. 1929, pp. 604, 612, 614, 618; 23 Halsbury, 2nd ed. 1936, p. 143, para. 200, and p. 156, para. 225.

If the Court finds against me, I ask that there be a reasonable stay of execution to enable us to make arrangements to move our business.

G. W. Gardhouse, for the defendant Chapman, respondent, and A. S. Pattillo, Q.C. (W. O. C. Miller, with him), for the respondent company, were not called on.

25th March 1953. The judgment of the Court was delivered orally by

PICKUP C.J.O.:—The facts are fully set forth in the reasons for judgment of the learned trial judge, and for the reasons given by him we think the plaintiff's action fails. We may add, however, that if on the facts of this case a Court of equity should not hold the plaintiff bound by the terms of the lease that was executed between the parties, the same result would, we think, be reached. We agree with the learned trial judge, for the

reasons given by him, that there was not part performance of any contract for a five-year term of lease unless it was the written lease executed by the parties. On the facts of this case we do not think a lease from year to year can be presumed as following the oral lease for a year. The plaintiff was either a tenant under the written lease executed by the parties or a tenant at will, and in either event the notice given was, in our opinion, effective to terminate the existence of the tenancy.

With regard to the relief granted on the counterclaim, we do not regard that as being a case of specific performance, but think that it is a declaration and order giving effect to the rights of the plaintiff by counterclaim which follow from the termination of the lease in question.

The appeal will be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Day, Wilson, Kelly, Martin & Morden, Toronto.*

*Solicitor for the defendant Chapman, respondent: George W. Gardhouse, Toronto.*

*Solicitors for the defendant company, respondent: Blake, Anglin, Osler & Cassels, Toronto.*

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[COURT OF APPEAL.]

Regina v. Kelso.

*Evidence — Corroboration — Functions of Judge and Jury — Necessity for Direction by Trial Judge as to Evidence Capable of Furnishing Corroboration.*

In a case where corroboration is either required by express statutory provision or desirable under the established rule of practice, the trial judge should not only define corroboration to the jury but also point out to them any piece or pieces of evidence that he, as a matter of law, considers capable of furnishing corroboration, if so accepted by the jury. *Rex v. Zielinski* (1950), 34 Cr. App. R. 193, is not a correct statement of the law of Ontario, and should not be followed.

*Evidence — Corroboration — What Evidence Capable of Furnishing Corroboration — Demeanour of Witnesses in Box.*

It is misdirection for a trial judge to tell the jury in a sexual case that they may find corroboration of the evidence of the complainant in the demeanour in the witness-box of a witness other than the complainant.

AN APPEAL by the accused from his conviction, before Chevrier J. and a jury, of attempted rape.

13th March 1953. The appeal was heard by LAIDLAW, HOPE and J. K. MACKAY JJ.A.

G. A. Martin, Q.C., for the accused, appellant: 1. The learned trial judge, although he gave the jury a general definition of what evidence might be considered corroborative, refused, although he was requested to do so, to point out any particular piece of evidence that might be regarded by them as corroborative. In taking this course he followed *Rex v. Zielinski*, 34 Cr. App. R. 193, [1950] 2 All E.R. 1114. That decision is in conflict with a long line of authorities in Canada, and with the practice that has been followed for many years in Ontario. I refer to the dissenting judgment of Martin C.J.B.C. in *Rex v. Picken*, 52 B.C.R. 264, 69 C.C.C. 61 at 64, [1937] 4 D.L.R. 425 (majority judgment reversed *sub nom. Picken v. The King*, [1938] S.C.R. 457, 69 C.C.C. 321, [1938] 3 D.L.R. 32); *Rex v. Hong Suey Chin*, [1950] 1 W.W.R. at 932, 96 C.C.C. 346, 9 C.R. at 381; *Rex v. Ignat*, 57 Man. R. 473, 96 C.C.C. 200 at 201, 9 C.R. 292, [1950] 1 W.W.R. 304; *Rex v. Drew*, [1933] 2 W.W.R. 243, 60 C.C.C. 229 at 238, [1933] 4 D.L.R. 592.

I can find no Ontario case where this has been expressly laid down, and suggest that this is because the practice has been so firmly established. [LAIDLAW J.A.: If *Rex v. Zielinski* is correctly decided, a trial judge could give a correct definition of corroboration, but no one would ever know whether the jury



found corroboration or whether, if they did, they took as corroborative only evidence that might in law be so regarded.] Precisely. The only particular direction the trial judge did give the jury was seriously in error, as will appear in my next submission.

[LAIDLAW J.A.: Is there any earlier English case to the same effect as *Rex v. Zielinski*?] I cannot find any, and my reading of the English cases indicates that the practice there was previously the same as here.

It is very clearly established in the cases that the question what evidence is capable of being corroborative is one of law, and that being so it is for the trial judge and he must deal with it.

2. The trial judge erred seriously in one or two statements he did make to the jury as to what might constitute corroboration. He told them that the behaviour of the accused in the witness-box was something from which corroborative inferences could be drawn. This, baldly stated in this way, is a serious misdirection.

[LAIDLAW J.A.: You need not deal with any further points that would lead only to a new trial, at least until we have heard counsel for the respondent.]

3. I ask not only for a new trial but for an acquittal, on the ground that on the evidence the jury could not as reasonable men have arrived at the conclusion that the Crown had negatived consent on the part of the complainant. The complainant did give some evidence of threats, but this was objected to on the ground that the allegation in the indictment was not that the act was done with consent extorted by threats, but that it was without consent. This objection was upheld by the trial judge.

To negative consent in the case of a mature woman who is under no disability at the time, something in the nature of a real struggle must be shown: *Rex v. Donovan*, [1934] 2 K.B. 498, 25 Cr. App. R. 1 at 7-9; *Rex v. Jones*, 49 B.C.R. 537, 63 C.C.C. 341, [1935] 2 W.W.R. 270, [1935] 3 D.L.R. 237; *Regina v. Cardo* (1888), 17 O.R. 11; Crankshaw's Criminal Code, 6th ed. 1935, p. 636; Roscoe's Criminal Evidence, 16th ed. 1952, pp. 880-1; *Rex v. Lovering*, [1948] O.R. 565, 92 C.C.C. 65, 6 C.R. 67.

If the complainant's story was accepted in full the accused was guilty of committing rape twice. In that case the only possible verdict would be one of guilty of rape. But the jury

convicted only of attempted rape. [LAIDLAW J.A.: The jury were entitled to accept only part of the complainant's story.] Theoretically that is true, but my suggestion in this case is that the verdict, coupled with the recommendation for leniency, was a compromise. [LAIDLAW J.A.: Is there any evidence at all to corroborate the complainant's story that she did not consent on the first occasion?] In my submission there is none.

C. P. Hope, Q.C., for the Attorney-General, respondent: I have found no case in which this precise point has ever come up for decision in this Province. Anything that has been said on the point in Ontario is, strictly speaking, obiter. [HOPE J.A.: But it is well established that in criminal matters we should follow decisions in other Provinces.] Cartwright J. says nothing about this point in his judgment in the most recent case, *Thomas v. The Queen*, [1952] 2 S.C.R. 344, 103 C.C.C. 193, 15 C.R. 1, [1952] 4 D.L.R. 306. [MACKAY J.A.: My reading of *Hubin v. The King*, [1927] S.C.R. 442, 48 C.C.C. 172, [1927] 4 D.L.R. 760, indicates that the law is as has been argued by Mr. Martin.] This was not precisely the point that arose in the *Hubin* case. There the Court was dealing with the situation where the trial judge pointed out evidence that was not capable in law of being corroborative. [MACKAY J.A.: Surely it would be inconsistent to say that if the trial judge wrongly pointed to a particular piece of evidence as capable of furnishing corroboration it would necessitate a new trial, but that if the jury made precisely that mistake no harm would be done.] That is the law under *Rex v. Zielinski*, *supra*. We never can know what goes on in the jury-room.

2. The trial judge's reference to "the behaviour of the witness in the box, or his unproved or contradictory statements" as capable of furnishing corroboration must be intended to mean the accused's inconsistent statements on different occasions, which may be properly regarded as corroborative under *Hubin v. The King*, *supra*. [LAIDLAW J.A. I do not see how the jury could have understood the trial judge's words in that sense.]

It might be that the accused gave his evidence so hesitatingly, and his demeanour was so "shifty", that it would justify an inference by the jury that he was guilty of the crime, having regard to the fact that the sole question was as to consent. I rely on a broad interpretation of *Rex v. Christie*, [1914] A.C. 545, 10 Cr. App. R. 141. [LAIDLAW J.A.: That would be very dangerous;

the accused might be of a highly nervous temperament, and his naturally nervous condition might be taken by the jury as evidence of his guilt.]

3. Even if this conviction must be set aside there should not be an acquittal. I concede that there are many inconsistencies in the complainant's story. [LAIDLAW J.A.: To which of the two occasions did the jury's verdict relate?] I cannot say, but they are so closely connected as to amount to a single offence. [LAIDLAW J.A.: There was a time interval, and the circumstances were entirely different.] Only if there is some substantial difference in the circumstances need there be separate charges: *Regina v. Brothers (or Stevenson)* (1952), 103 C.C.C. 108. [LAIDLAW J.A.: On one view of the evidence it might be said that the complainant consented on one occasion and not on the other.]

[LAIDLAW J.A.: If there is a new trial, will it be for the judge presiding at that trial to amend the indictment to a charge of attempted rape?] Yes, under the authority of *Welch v. The King*, [1950] S.C.R. 412, 97 C.C.C. 177, 10 C.R. 97, [1950] 3 D.L.R. 641.

*G. A. Martin, Q.C.*, in reply.

*Cur. adv. vult.*

10th April 1953. The judgment of the Court was delivered by

LAIDLAW J.A.: The appellant was indicted for rape and, after trial before Chevrier J. and a jury at Ottawa, the verdict was "not guilty of rape, but guilty of attempted rape, with a recommendation for leniency". He now appeals from his conviction.

Counsel for the appellant asks this Court to quash the conviction and direct a judgment and verdict of acquittal to be entered. He argues that the case falls within s. 1014(1) (a) of The Criminal Code, R.S.C. 1927, c. 36, and that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. I am not willing to give effect to the forceful and persuasive argument of counsel, but I refrain from discussing the evidence in detail because of my opinion that the appellant is entitled to a new trial.

The first ground presented by counsel for the appellant in his argument before this Court was that the learned trial judge



erred in refusing to point out to the jury what evidence or parts of the evidence they might properly consider in reaching a decision as to whether or not there was corroboration in fact of the testimony of the complainant. When that objection was taken by counsel at trial after the charge to the jury, the learned trial judge stated frankly and plainly (in the presence of the jury) that before reading and considering the decision of the Court of Criminal Appeal in England in *Rex v. Zielinski*, 34 Cr. App. R. 193, [1950] 2 All E.R. 1114, he had followed the practice which counsel for the appellant urged him to maintain in the instant case. He changed his mind and his practice, and on the authority of that case decided that in the circumstances it was unnecessary for him to point out to the jury any pieces of evidence which in the exercise of their discretion they might regard as corroboration. I think the learned trial judge should have adhered to his practice before the decision in *Rex v. Zielinski*. That practice has the support and authority of long usage and experience of distinguished and learned judges at assizes in this Province and elsewhere in the Dominion. I refer to a few only of the many cases in which that practice appears and to observations relating thereto.

In *Rex v. Frank* (1910), 21 O.L.R. 196, 16 C.C.C. 237, Meredith J.A. said: "It is the right, and indeed the duty, of the trial Court, not only to instruct the jury as to the law bearing upon the case being tried, but also to aid them in regard to matters of fact by calling their attention to such things as may the better enable them to perform their whole duties."

In *Rex v. Beauchesne*, [1933] 1 W.W.R. 216 at 221, 60 C.C.C. 25 at 31, [1933] 4 D.L.R. 128, Mackenzie J.A. said: "It was the duty of the trial Judge, of course, in a case like this, where corroboration is required under s. 1002 of the Code, to instruct the jury as to what evidence, if any, bore that character."

In *Rex v. Picken*, 52 B.C.R. 264 at 269, 69 C.C.C. 61 at 64, [1937] 4 D.L.R. 425, Martin C.J.B.C. said, in a dissenting judgment: "... the error there is that the whole question of corroboration, as to whether there was any corroboration at all, was left to the jury, and instead of telling them that there was corroborating evidence and pointing out to them what it was and leaving the inferences from and weight of it to them, he left that very important subject-matter at large to them to extract it unguided from the whole body of evidence."

This point was not discussed in the Supreme Court of Canada, where the judgment of the majority was reversed, *sub nom. Picken v. The King*, [1938] S.C.R. 457, 69 C.C.C. 321, [1938] 3 D.L.R. 32.

In *Rex v. Ignat*, 57 Man. R. 473 at 477, 96 C.C.C. 200 at 201, 9 C.R. 292, [1950] 1 W.W.R. 304, Richards J.A. said: "The judge did not point out to the jury what evidence they might consider corroborative and tell them that it was for them to decide whether it should be regarded as corroborative. . . ."

In *Rex v. Hong Suey Chin*, [1950] 1 W.W.R. at 932, 96 C.C.C. 346, 9 C.R. at 381, Parlee J.A. said, at p. 934: "The jury were not told what particular evidence might be considered corroborative and thus, of course, were not told that it was for them to decide whether they accepted such evidence as corroborative and the weight to be attached to it."

I also refer to the following cases I have read: *Hubin v. The King*, [1927] S.C.R. 442, 48 C.C.C. 172, [1927] 4 D.L.R. 760; *Rex v. Auger*, 64 O.L.R. 181, 52 C.C.C. 2, [1929] 4 D.L.R. 864; *Thomas v. The Queen*, [1952] 2 S.C.R. 344, 103 C.C.C. 193, 15 C.R. 1, [1952] 4 D.L.R. 306; *Manos v. The Queen*, [1953] 1 S.C.R. 91, 104 C.C.C. 330, 15 C.R. 363.

I desire to add that in my consideration of this point I have had the benefit of consultation with the other two members of this Court. I am permitted by them to say that when on the trial Court it was their practice, as it was formerly the practice of the learned trial judge in the present case, to bring to the attention of the jury for their consideration pieces of evidence of a corroborative character which might assist the jury in their duty to determine its weight and value.

The issue whether or not there is corroboration of the complainant's testimony is an important one not only in cases where corroboration is essential by reason of a statutory requirement but also in cases where it is desirable because of the danger of convicting an accused person in the absence of it. It is equally important and necessary in both classes of case for a proper consideration and determination by a jury of that important issue that a trial judge should review the evidence to which the principles of law enunciated by him are properly applicable. The jury is entitled to have the assistance of the presiding judge and the case should be left to the jury in such a way as to ensure

their due appreciation of the value of the evidence: *Rex v. Finch* (1916), 12 Cr. App. R. 77; *Rex v. Baugh* (1917), 38 O.L.R. 559 at 565, 28 C.C.C. 146, 33 D.L.R. 191; *Rex v. MacDonald: Rex v. Mancuso*, [1945] O.W.N. 430, 84 C.C.C. 177, [1945] 3 D.L.R. 764.

If the learned trial judge decides erroneously that certain evidence is corroborative in character when it is not so, and in his charge to the jury leaves it open to them to accept such evidence as corroborative, then a conviction may be quashed: *Rex v. Reardon*, [1945] O.R. 85, 83 C.C.C. 114, [1945] 1 D.L.R. 795; *McIntyre v. The King*, [1945] S.C.R. 134, 83 C.C.C. 97, [1945] 1 D.L.R. 631; *Rex v. Zielinski, supra*. When the learned trial judge decides as a matter of law that there is evidence of a corroborative character that can be accepted by a jury, he knows the evidence upon which he has made his decision. Why should he not assist the jury by directing their attention to that evidence and thus enable them to proceed in their deliberations in a properly-guided way? Having particular regard to that fact, why should the jury be left to search at large through the evidence to discover, if they can, that part or parts of it which is or are known to the learned trial judge? The danger of their finding what they should not find and the peril arising from such an error of convicting an innocent person is so great that, in my opinion, it cannot be said that the accused has had a satisfactory or fair trial when the case is left to the jury in that way. If the learned trial judge is silent as to the evidence which in his opinion is of a corroborative character, the accused and his counsel are in effect deprived of the right to object to the decision of the learned trial judge on a point of law. Moreover, a convicted person and his counsel are left in doubt as to whether the jury properly applied the principles of law and accepted only that piece or those pieces of the evidence that might properly be regarded as corroboration. Thus, neither counsel nor this Court can say whether a verdict of guilty is good or bad in law.

In the instant case the jury deliberated from 3.28 p.m. until 12.40 a.m. the following day. It is obvious that they had much difficulty in reaching their verdict. The circumstances made their task an unusually heavy one, demanding the greatest possible assistance from the trial judge, particularly in the matter of corroboration. The complainant gave evidence that



she was ravished on two occasions, the second one following a short time after the first and in different circumstances. The accused testified in respect of one occasion only. Did the jury find that the offence of attempted rape was committed on the first or on the second occasion described in evidence by the complainant? Did the learned trial judge decide that there was evidence which the jury might consider and regard as corroborative in respect of one or the other or both occasions? If there was no evidence of a corroborative character relating to the first occasion—and I make it plain that I find it unnecessary to decide that question now—and the jury convicted the accused for his conduct on that occasion, did they after long hours of search find corroboration from some evidence that they should not have used for that purpose, or did they reach their verdict of guilty without any corroboration of the complainant's testimony and notwithstanding the danger of so doing? I do not know, and therefore I cannot say whether the verdict is good or bad in law. I cannot say that no substantial wrong or miscarriage of justice has been occasioned by the non-direction in the charge. On the contrary, I think the non-direction amounts to misdirection and makes the trial so unsatisfactory as to necessitate a new trial.

With the utmost respect for the great learning and judgment of all members of the Court, composed of Lord Goddard C.J., Byrne J. and McNair J., in *Rex v. Zielinski*, *supra*, I must nevertheless decline to accept that judgment as a statement of the law in this Province that it is unnecessary that a trial judge should point out to the jury the pieces of evidence which can amount to corroboration. The decision in that case cannot be reconciled with Canadian decisions, or, indeed, with prior decisions in England: see, for instance, *Rex v. Martin* (1934), 24 Cr. App. R. 177. Likewise it cannot be reconciled with the settled practice in this Province, and I respectfully express the view that our practice is so soundly founded in principle and in reason that departure from it should not be authorized by this Court.

The second ground of appeal is that the learned trial judge misdirected the jury when he instructed them as follows in the matter of corroboration:

"Now then, the nature of that evidence, the corroborative nature, must be something that will strengthen the statement made by the complainant; something said by some one else but the complainant that fits in . . . That is, that whatever evidence you find somewhere else, it must be consistent only with the crime having been committed; that is, the complainant having been carnally known by the accused . . . the evidence must be consistent with only one thing, his guilt. For instance, the behaviour of the witness in the box, or his unproved or contradictory statements are questions from which statements of fact the jury may properly find corroboration; so that it is your duty then to scan the evidence carefully to find out if there is some independent evidence outside of that of the complainant that strengthens her testimony by implicating the accused in some material respect."

The latter part of this passage is not entirely clear in meaning, but I am satisfied that a jury would accept it in part as a statement that the demeanour of a witness other than the complainant might properly be regarded by them as corroboration of the complainant's story. That direction, if so understood, was erroneous and, having regard to the particular circumstances of the case and the long deliberation of the jury, it might well have influenced them in reaching their verdict. In my opinion, it makes the charge so unsatisfactory as to be sufficient ground for a new trial.

There were a number of other objections to the charge set forth in the notice of appeal. The Court did not find it necessary to hear counsel for the appellant in support of them, and I express no views as to the merit of any of such grounds.

I would allow the appeal and direct that there be a new trial, limited, however, to a charge against the accused of attempted rape, and leaving to the judge presiding at such new trial all questions arising from or incidental to the fact that the accused was indicted for rape and was found not guilty of that offence.

*New trial ordered.*

*Solicitors for the accused, appellant: Mirsky, Soloway & Mirsky, Ottawa.*

## [COURT OF APPEAL.]

**Regina v. Beauchamp.**

*Motor Vehicles — Offences — Driving without Due Care and Attention — The Highway Traffic Act, R.S.O. 1950, c. 167, s. 29(1) — Elements of Offence — Standard of Care to be Applied — Necessity for "Criminality" in Accused's Conduct.*

While the same facts may, and in many cases do, give rise to both civil and criminal proceedings, there is nevertheless no necessity, in dealing with criminal or quasi-criminal conduct in relation to the operation of motor vehicles, for entering into a discussion or consideration of the negligence that will support a civil action.

To support a charge under s. 29(1) of The Highway Traffic Act the evidence must prove beyond reasonable doubt that the accused drove in the manner prohibited by the subsection, *viz.*, without due care and attention or without reasonable consideration for others. The standard of care and skill to be applied is well established, and is not that of perfection. A driver is required to exercise a reasonable amount of skill, and to do what an ordinary prudent person would do in the circumstances. The use of the term "due care", which means the care owing in the circumstances, makes it clear that, while the legal standard of care remains the same in the sense that it is always what the ordinary prudent men would do in the circumstances, the factual standard is constantly shifting, depending on road, visibility, weather conditions, traffic conditions that exist or may reasonably be expected, and any other conditions that an ordinary prudent driver would take into consideration. The standard is an objective one, fixed in relation to the safety of other users of the highway, and in no way related to the degree of proficiency or experience attained by the individual driver whose conduct is in question.

It is not enough, however, to support a conviction under s. 29(1), that the accused's conduct should be shown to fall below this standard. Since the subsection creates an offence that is quasi-criminal in nature, it must also appear that the accused's conduct has been of such a nature that it can be considered a breach of duty to the public, and as such deserving of punishment by the State.

*Rex v. Stewart*, [1947] O.W.N. 357; *Rex v. Nickel*, [1947] O.W.N. 774, disagreed with; *Regina v. Seabrook*, [1952] O.R. 471; *Regina v. Parsons* (1952), 7 W.W.R. (N.S.) 359, considered; other authorities referred to.

AN APPLICATION by the accused for leave to appeal, and an appeal, from the judgment of Madden Co. Ct. J., in the County Court of the United Counties of Prescott and Russell, dismissing an appeal from a conviction by a magistrate for driving without due care and attention or without reasonable consideration for others, contrary to s. 29(1) of The Highway Traffic Act, R.S.O. 1950, c. 167.

10th December 1952. The application and appeal were heard by PICKUP C.J.O. and J. K. MACKAY and F. G. MACKAY JJ.A.

G. A. Martin, Q.C., for the accused, appellant: We seek leave to appeal on two grounds of law alone: (1) that there was no evidence to support the conviction, and (2) that the conviction is bad in law in that it sets out two offences in the alternative.



[THE COURT reserved judgment on the motion for leave to appeal, and directed that argument proceed on the merits of the appeal.]

1. The County Court Judge, by affirming the conviction in this case, virtually requires a standard of perfection in driving. The Legislature surely could not have intended to make a man liable to imprisonment for a mere momentary failure of attention. My submission is that the prosecution must prove a want of attention amounting to indifference to the safety of others, although I concede that it need not go as far under this section as is required on an indictment for criminal negligence, as laid down in *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576, [1937] 2 All E.R. 552.

This is a penal provision, and it must require something more than a mere error in judgment or miscalculation. The magistrate must find indications of a want of care before he can find an absence of due care and attention. This accused had no reason to anticipate the situation that arose, and he did not know until he was actually on the street that his rear-view mirror was not functioning properly. [F. G. MACKEY: Would the effect of the subsection be different if the word "due" were omitted?] Yes; that word implies that the care and attention must be related to the particular circumstances of the case.

The first case dealing with this subsection in Ontario is *Rex v. Stewart*, [1947] O.W.N. 357, 88 C.C.C. 409, and the later case of *Rex v. Nickel*, [1947] O.W.N. 774, 90 C.C.C. 121, is in direct conflict. The learned trial judge in this case does not refer to either of these cases, but he must have been applying the standard laid down in *Rex v. Stewart*; otherwise he could not have convicted. [PICKUP C.J.O.: I am not sure, from reading his reasons, that he was proceeding on that basis.] The judgment in *Regina v. Seabrook*, [1952] O.R. 471, 103 C.C.C. 7, 14 C.R. 223, does not settle the difficulty, or decide whether anything more than civil negligence is required.

2. The conviction is for driving without due care and attention or without reasonable consideration for others using the highway. This is a conviction for two distinct offences, in the alternative, and both of the offences were charged in the information, in violation of s. 710(3) of The Criminal Code, R.S.C. 1927, c. 36.

*Rex v. Surrey Justices; Ex parte Witherick*, [1932] 1 K.B. 450, is direct authority for my proposition, and also points out that under the corresponding English section reasonable consideration is required only for others actually on the highway, and not for those who may come on to it, or who may be expected there, as is the case under s. 285(6) of The Criminal Code, enacted by 1938, c. 44, s. 16. The judgment in *Rex v. Rousseau*, [1938] O.R. 472, 70 C.C.C. 252, [1938] 3 D.L.R. 574, is not in conflict with the English case. The section there considered was entirely different, and the report does not indicate that the *Surrey Justices* case was cited to the Court. Further, there is a substantial error in the judgment in *Rex v. Rousseau*, in the statement at p. 475 that there are no English statutory provisions corresponding to s. 723(3) of The Criminal Code: Paley on Summary Convictions, 9th ed. 1926, p. 191.

Section 723(3) cannot save this conviction, as was held in *Rex v. Rousseau*. It refers to the description of "any offence", which must mean a single offence, and cannot apply to a provision, such as s. 285(4) of The Criminal Code, as re-enacted by 1930, c. 11, s. 6 and amended by 1935, c. 56, s. 4 and 1947, c. 55, s. 10, which itself creates different offences: *Rex v. Higgins*, 63 O.L.R. 101, 50 C.C.C. 381 at 383, [1929] 1 D.L.R. 629. The judgment in *Thomson v. Knights*, [1947] K.B. 336, [1947] 1 All E.R. 112, is distinguishable. Nor does s. 725 as re-enacted by 1948, c. 39, s. 24, help, because again it refers to "the offence" that may be "committed in different modes". [F. G. MACKAY J.A.: Can it not be said that s. 29(1) creates one offence, driving carelessly, in one of the ways specified?] It might be so held if the question were *res integra*, but I submit that the decision in *Rex v. Surrey Justices; Ex parte Witherick*, *supra*, is a binding decision on the point.

I refer also to *Rex v. Madill*, [1943] 1 W.W.R. 365, 79 C.C.C. 206, [1943] 2 D.L.R. 570; *Rex v. Disney* (1933), 24 Cr. App. R. 49; *Rex v. Manheim* (1926), 30 O.W.N. 317.

*C. P. Hope, Q.C.*, for the informant, respondent: 1. There is ample evidence of improper driving in this case. It is incumbent on anyone backing a car, and *a fortiori* a long bus with a "blind spot" behind it, to make sure that there is nothing behind that he can run into. The accused should have had someone on the street guiding him. [F. G. MACKAY J.A.: Does that not

depend on the circumstances? The standard of care must vary.] My understanding of "due care" is proper care in all the circumstances, and my submission is that the care in this case was not "due". The basis on which the trial judge made his findings in this case was that the accused was "driving blind". He brings his decision directly within *Regina v. Seabrook*, *supra*.

It is not necessary in this case to decide whether the subsection requires more than "civil negligence", or to resolve the conflict in the reported cases. [F. G. MACKAY J.A.: If an accident results from lack of skill, is it within the subsection?] If the lack of skill results in driving in the way set out in the subsection the driver will be liable to conviction under it. [J. K. MACKAY J.A.: That argument involves a divorce of the idea of lack of care from any act of the mind.] The fact of driving without the requisite skill involves an exercise of the mind.

2. On this point I rely entirely on *Rex v. Rousseau*, *supra*. It is a judgment of this Court, and this Court is bound by it, notwithstanding the English judgment that has been cited. [PICKUP C.J.O.: Do you concede that if we come to the conclusion that this subsection creates two distinct offences the conviction is not cured by ss. 723 and 725?] I think I must concede that.

G. A. Martin, Q.C., in reply. *Rex v. Rousseau*, *supra*, did not decide anything about s. 29(1), but dealt with a section worded in an entirely different way. The only way in which that judgment can be justified is by saying that the Court considered that the words in the section there under consideration were used synonymously, or in amplification of each other.

*Cur. adv. vult.*

15th April 1953. The judgment of the Court was delivered by

F. G. MACKAY J.A.:—The appellant was convicted at the town of Rockland, in the county of Russell, on the 4th April 1952, of unlawfully driving a motor vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway, contrary to s. 29(1) of The Highway Traffic Act, R.S.O. 1950, c. 167, and fined the sum of \$5 and costs. On appeal to His Honour Judge Madden on a trial *de novo*, the appeal was dismissed and the conviction was



affirmed. The defendant now asks leave to appeal to this Court pursuant to the provisions of s. 769A of The Criminal Code, R.S.C. 1927, c. 36, enacted by 1947-48, c. 39, s. 34.

The appellant, a motor bus driver employed by the Colonial Coach Company, was charged as a result of an accident which occurred at about 7 a.m. on the 20th March 1952 on Laurier Street in the town of Rockland. Laurier Street runs east and West. On the north side of the street there was a public garage known as Dupuis' Garage, in which some of the Colonial buses were kept overnight. One Mannie, driving west on Laurier Street, stopped his car on the north side of the street at a point about 60 feet east of the entrance of the Dupuis garage and went to the garage. He said that at the time he stopped his car there were two passenger buses on the street—one parked on the north side facing west between his car and the Dupuis garage, the second one also facing west about opposite the first one and on the south side of the street. As he went into the garage a man called to him that his car was backing up and he found that the second bus had backed up and struck his car. The driver of this bus was the accused.

The evidence of the accused was that he drove the bus out of the garage to permit a third bus to get out; that as he came out of the garage on to the street he looked to the east and Mannie's car was not then parked on the street nor did he see it approaching; that on entering the street he turned to the west and stopped in the middle of the street, intending to back his bus into position on the north side of the street behind the bus that was already there; that he was stopped for a few seconds only to permit the bus following him to get out; that this third bus came out and drove away, going east on Laurier Street; that he then turned in his seat and looked through the back window of his bus, looked in the rear-view mirror located inside the bus and at a mirror located on the left fender. This last mirror, he said, was loose and owing to the vibration was useless as a rear-view mirror. He did not see Mannie's car and proceeded to back very slowly into position on the north side of Laurier Street and, in doing so, struck the Mannie car.

A witness for the prosecution, one Fred Lessard, who is the owner of a garage on the south side of Laurier Street opposite Dupuis' Garage, said that he was standing on the south sidewalk;

that he saw the accused drive his bus out on to the street; that the bus stopped momentarily—in chief he said for less than a minute, and in cross-examination he said for a few seconds—and that the bus then proceeded to back at a pace that he described as “very, very slowly, barely moving”, and that just as it was coming to a stop it bumped the car very lightly; he had not previously noticed the parked car.

From this evidence it is clear that Mannie came along and parked his car during the very short interval in which the bus driven by the accused was standing on the street before backing into position at the north curb. As a result of the collision the bumper, grille, fender and headlight of Mannie’s car were damaged.

While the notice of appeal sets out a number of grounds of appeal, at the hearing in this Court counsel for the appellant relied on two grounds only: (1) that there was no evidence which in law justified a conviction; and (2) that the charge was bad for duplicity.

In regard to the first ground, we were referred to a number of cases from which it appears that there is a difference of judicial opinion as to whether an offence under s. 29(1) of The Highway Traffic Act is made out by proof of such negligence as would entitle a plaintiff in a civil action to damages. The wording of s. 29(1) of the Ontario Act is the same as that of s. 12 of the English Road Traffic Act, 1930, c. 43, and the traffic Acts of many of the common law Provinces in Canada contain sections the same as or similar to s. 29(1) of the Ontario Act.

The most recent Ontario cases are: *Rex v. Stewart*, [1947] O.W.N. 357, 88 C.C.C. 409; *Rex v. Nickel*, [1947] O.W.N. 774, 90 C.C.C. 121; and *Regina v. Seabrook*, [1952] O.R. 471, 103 C.C.C. 7, 14 C.R. 223.

In *Rex v. Stewart*, His Honour Judge Factor says: “. . . I have concluded that all degrees of negligence, including civil negligence, are included in the words of s. 27 [now s. 29(1)] of The Highway Traffic Act.”

In support of this conclusion he refers to and quotes from the case of *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576, [1937] 2 All E.R. 552; *McCrone v. Riding*, [1938] 1 All E.R. 157; and *McLean v. Pettigrew*, [1945] S.C.R. 62, [1945] 2 D.L.R. 65.

In *Rex v. Nickel*, His Honour Judge Harvie, after considering the same cases and *Rex v. Stewart*, says: "The present Ontario Act is crystallized from previous legislation covering so-called 'reckless driving' and confines itself to the different and lower category of careless driving, which, in my view, contemplates and was intended to contemplate a higher degree of negligence than that giving rise to an action in the civil courts for the mere recovery of damages. The offence of careless driving is of a quasi-criminal nature. It is something which goes beyond mere error in judgment. It indicates a measure of indifference, a want of care for the matter in hand and an indifferent regard for the rights of others."

In *Regina v. Seabrook* (a stated case after a conviction under s. 29(1) of The Highway Traffic Act), McRuer C.J.H.C., after careful consideration and discussion of the decisions in *Rex v. Stewart*, *Rex v. Nickel*, and the English authorities referred to in these cases, and the further cases of *Kingman v. Seager*, [1938] 1 K.B. 397; *Durnell v. Scott*, [1939] 1 All E.R. 183; *Bracegirdle v. Oxley*, [1947] K.B. 349, [1947] 1 All E.R. 126; and Salmond on Torts, 10th ed. p. 61, says:

"Apart from any question arising out of a charge of manslaughter, I find the English cases dealing with s. 11 of The Road Traffic Act, 1930, of great assistance in deciding the problem before me. A careful examination of them satisfies me that there has been a tendency in Canada to apply the *Andrews* case in so far as it discusses degrees of negligence as related to charges laid under s. 285(6) of The Criminal Code in a way that it was not intended to be applied.

"In applying s. 285(6) to certain proved facts I can see no justification for becoming involved in a consideration of the law of civil negligence or degrees of negligence. The words used by Parliament are clear, unambiguous English words. If the character of the driving is proved to be of such a nature as to come within what is described as an offence the accused is guilty. If it is not proved beyond a reasonable doubt to be such the accused should be found not guilty. I do not think that Parliament ever intended that the dividing-line between guilt and innocence should be some sort of 'no man's land' which can only be described as negligence that goes beyond a mere matter of compensation between subjects or something that is



measured in relation to the involved subject of civil negligence. There seems to be no reason why the words should not be applied in their ordinary connotation as used in the English language and if they are so applied there should be no great difficulty in deciding any particular case. This would appear to be the view taken in the English Courts in three cases dealing with s. 11 of The Road Traffic Act and in one case dealing with s. 12 of The Road Traffic Act, which is substantially similar to s. 29(1) of The Highway Traffic Act of Ontario. In none of these cases did the judges discuss the question of negligence, nor is the word 'negligence' mentioned in any of them."

In *Regina v. Parsons* (1952), 7 W.W.R. (N.S.) 359, an appeal from a conviction under s. 66a of The Vehicles and Highway Traffic Act of Alberta, the wording of which appears to be identical with that of s. 29(1) of the Ontario Act, Sissons J., of a District Court in Alberta, discusses all of these cases and comes to the conclusion that *Andrews v. Director of Public Prosecutions* and *McLean v. Pettigrew* are authority for the proposition that the section covers all degrees of negligence, but are not authority for the converse proposition that any degree of negligence constitutes driving without due care and attention and, further, that they are not authority for the proposition that evidence which would be sufficient to support a finding of negligence (or of driving without due care and attention) in a civil action is sufficient to support a conviction under this section.

In 23 Halsbury, 2nd ed. 1936, p. 649, para. 915, dealing with the relation between civil and criminal remedies for negligence, it is stated: "Where negligence consists of or involves an unlawful act or default which is an offence against the public, and renders the person who is guilty of the act or default liable to legal punishment, the negligent act or default amounts to a crime, and where such act or default results in injury to a private person, a right to take civil proceedings may ensue to such private person and co-exist with the right to award punishment in proceedings instituted at the suit of the Crown."

Dr. Mazengarb in his text-book "Negligence on the Highway", 2nd ed. 1952, at p. 266, in the opening paragraphs of the chapter on "Criminal Liability", says:

"In the preceding chapters, negligence has been regarded as a tort—a breach of duty to others which gives rise to an action for damages. We have now to consider negligent conduct as a crime, or quasi-crime—a breach of duty to the whole community, deserving of punishment.

"An award of damages against a negligent motorist, nowadays, cannot always be regarded as a sufficient sanction, because all motorists are compelled to insure against risk of injury to third parties, and many are insured against damage which they may cause to passengers or property. In the final result, most awards of damages are paid out of funds to which both careful and careless motorists contribute. [In Ontario the provisions in regard to the unsatisfied judgment fund have a similar effect.]

"Apart altogether from ensuring that those who suffer injury receive the compensation to which they are entitled, the State is also interested in the orderly regulation of traffic on the highway, and has a potential interest in the lives and the well-being of its citizens. It seeks to achieve its ends by various means; first, by providing that motor vehicles shall not be driven on the highway unless they are properly equipped; secondly, by requiring adequate skill in driving; thirdly, by revoking the licences of those who show by their actions that they are careless of the rights of others; and finally, by punishing those who commit breaches of the laws which are considered essential for safety. The degree of negligence, the standard of proof required to support a charge, and the nature of the penalty which may be imposed all vary according to the gravity of the offence. In criminal cases, English law recognizes different degrees of negligence. It has created specific offences punishable by different maximum penalties: for example, manslaughter, dangerous driving, and driving without due care and attention."

With respect I do not agree with the reasoning in the cases of *Rex v. Stewart* and *Rex v. Nickel*. To the extent hereinafter indicated I do agree with the reasoning and conclusions in the cases of *Regina v. Seabrook* and *Regina v. Parsons*. The statement in *Mazengarb* at p. 266 is a statement of the policy of the law rather than a statement of law and is useful in that it indicates in a general way the reasons for the different categories of punishable conduct in the operation of motor vehicles.

My conclusions are that, while the same facts may, and in many cases do, give rise to both civil and criminal proceedings, nevertheless there is no necessity, in dealing with criminal or quasi-criminal conduct in relation to the operation of motor vehicles, for entering into a discussion or consideration of the negligence that would support a civil action. It is also clear that there are different degrees of criminal or quasi-criminal negligence.

Section 29(1) of The Highway Traffic Act creates a statutory offence that is quasi-criminal in its nature: *Rex v. Van Leishout*, [1943] O.W.N. 746, 80 C.C.C. 361.

A crime is defined in 9 Halsbury, 2nd ed. 1933, p. 9, para. 1, as follows: "A crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment. While a crime is often also an injury to a private person, who has remedy in a civil action, it is as an act or default contrary to the order, peace, and well-being of society that a crime is punishable by the State. A civil proceeding has for its object the recovery of money or other property, or the enforcement of a right for the advantage of the person suing, while a criminal proceeding has for its object the punishment of a public offence."

To support a charge under s. 29(1) of The Highway Traffic Act, the evidence must be such as to prove beyond reasonable doubt that the accused drove in the manner prohibited by the subsection, namely, without due care and attention or without reasonable consideration for others. The standard of care and skill to be applied has been long established and is not that of perfection. It is, I think, correctly stated in Mazengarb, *op cit.*, at pp. 176-7, as follows:

"The law does not require of any driver that he should exhibit 'perfect nerve and presence of mind, enabling him to do the best thing possible.' It does not expect men to be more than ordinary men. Drivers of vehicles cannot be required to regulate their driving as if in constant fear that other drivers who are under observation, and apparently acting reasonably and properly, may possibly act at a critical moment in disregard of the safety of themselves and other users of the road.

"But the law does insist upon a reasonable amount of skill in the handling of a vehicle which is a potential source of



danger to other users of the road. . . . The question always is 'What would an ordinary prudent person in the position of the plaintiff have done in relation to the event complained of?' " (Pollock on Torts uses the term "average man".)

Motor vehicles are now in general use as a common means of transportation and pleasure. If too high a standard of care and skill were demanded, those people who are not capable of attaining such a standard would be deprived of the privilege of driving motor vehicles, and their use would be confined to experts, and even persons who might become experts might well be prevented from qualifying as such by experience. It must also be borne in mind that the test, where an accident has occurred, is not whether, if the accused had used greater care or skill, the accident would not have happened. It is whether it is proved beyond reasonable doubt that this accused, in the light of existing circumstances of which he was aware or of which a driver exercising ordinary care should have been aware, failed to use the care and attention or to give to other persons using the highway the consideration that a driver of ordinary care would have used or given in the circumstances? The use of the term "due care", which means care owing in the circumstances, makes it quite clear that, while the legal standard of care remains the same in the sense that it is what the average careful man would have done in like circumstances, the factual standard is a constantly shifting one, depending on road, visibility, weather conditions, traffic conditions that exist or may reasonably be expected, and any other conditions that ordinary prudent drivers would take into consideration. It is a question of fact, depending on the circumstances in each case.

In this case, and in some of the cases to which I have referred, evidence has been admitted to show that the accused had a good record as a careful driver. Such evidence is not relevant on the issue of guilt or innocence. As was said by Lord Hewart C.J. in *McCrone v. Riding*, *supra*, at p. 158: "That standard is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience attained by the individual driver."

There is a further important element that must also be considered, namely, that the conduct must be of such a nature

that it can be considered a breach of duty to the public and deserving of punishment. This further step must be taken even if it is found that the conduct of the accused falls below the standard set out in the preceding paragraphs. This principle may be somewhat difficult to apply, but I think it might be illustrated by the common example of a motorist attempting to park at the curb in a space between two other parked vehicles. Frequently one or other of the parked vehicles is bumped in the process. Damage seldom arises, because cars are equipped with bumpers, but if damage were caused it might well give rise to a civil action for damages, but it could hardly be said to be such a lack of care or attention as would be considered to be deserving of punishment as a crime or quasi-crime.

Applying these principles to the facts of this case, I am of the opinion that the appellant is right in his submission that there is no evidence to justify a conviction. The uncontradicted evidence is that the appellant looked while coming out of the garage and there was then no motor car parked on the street. He looked through the back window of the bus and also in the rear-view mirror before backing and then backed very slowly. He did not see the parked car, apparently because of the length of his vehicle, the position of his rear window and the relative position of the car at that time. It was 7 a.m. in a small town, when he might reasonably have anticipated that a car would not drive up behind his bus into a position where it could not be seen through his rear window in the very brief period of time that elapsed between his coming out of the garage and his backing up. It was clearly not such a lack of care in these circumstances as could be considered deserving of punishment. It is perhaps unnecessary to add that had the accident occurred during a busy time of the day, when traffic might reasonably have been expected, the result might have been different; nor do I intend to suggest that his conduct was not such as might give rise to civil liability.

The second ground of appeal is that the charge is bad for duplicity. Since this point was not raised in either of the Courts below, I do not think we should now permit it to be raised in this Court.

Leave to appeal should therefore be granted, the appeal should be allowed and the conviction should be quashed, the

fine and any costs paid by the appellant in the Courts below to be returned to him forthwith.

*Conviction quashed.*

*Solicitors for the accused, appellant: Mirsky, Soloway & Mirsky, Ottawa.*

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[LEBEL J.]

**Guaranty Trust Company of Canada v. Quality Steels (Canada) Limited et al.**

*Public Utilities — Rates and Charges — Nature of Indebtedness for Public Utilities Supplied — Priorities as against Trustee for Bondholders — The Public Utilities Act, R.S.O. 1950, c. 320, s. 30(1), (2) — The Assessment Act, R.S.O. 1950, c. 24, ss. 98, 114(11) — The London Water-works Act, 1873 (Ont.), c. 102, s. 12a, enacted by 1878, c. 27, s. 1.*

*Statutes — Operation — Repeal by Implication — Implied Repeal of Special Act by Later General Act.*

The entry on the municipal collector's roll of an amount owing for public utilities supplied, pursuant to s. 30 of The Public Utilities Act, does not transform that amount into municipal taxes, so as to give it the protection of the special lien created by s. 98 of The Assessment Act, or to make s. 114(11) of that Act applicable. The lien that exists for such an indebtedness is only that provided for in s. 30(2) of The Public Utilities Act, and extends only to "the estate or interest in the lands" of the person indebted. Consequently, if the indebtedness is incurred by a company after it has given a deed of trust and mortgage on all its assets and undertaking, the public utilities commission, and the municipality as its collecting agent, will not be entitled to priority over the trustee under the deed.

Section 12a (enacted in 1878) of The London Water-works Act, 1873, has been impliedly repealed by the enactment of what is now s. 30 of The Public Utilities Act.

AN APPEAL by the City of London and the Public Utilities Commission of the City of London from the report of Cook, Master.

The reasons for judgment of the Master were as follows:

19th December 1952. COOK, MASTER:—By judgment dated the 10th January 1952 it was directed that the trusts of the deed of trust and mortgage herein be performed and carried into execution and that it be referred to the Master to make an enquiry, *inter alia*, as to what other encumbrances, either prior or subsequent, affect the priority comprised in or charged by the said indenture. The deed of trust and mortgage contained a specific mortgage and charge against the lands, buildings, fixed plant and machinery, and a floating charge on all assets of the company "now owned or hereafter acquired".



The Public Utilities Commission of the City of London and the Corporation of the City of London filed a claim for \$12,146.28 for power supplied for office lighting and for water supplied after the execution and delivery of the deed of trust and mortgage. The claimants submit that this amount should be paid in priority to the amount owing under the deed of trust and mortgage by reason of s. 30 of The Public Utilities Act, R.S.O. 1950, c. 320, which provides that:

“(1) The amount payable to a municipal corporation or to a public utility or hydro-electric commission of a municipality or to The Hydro-Electric Power Commission of Ontario for a period not exceeding three months by the owner or occupant of any lands for the public utility supplied to him for use thereon shall be a lien and charge upon the estate or interest in such land of the person by whom the amount is due and may be collected by distress upon the goods and chattels of the person and by the sale of his estate and interest in the lands.

“(2) The clerk of the municipality shall, upon notice to him of the amount due and of the person by whom it is due and of the lands upon which a lien is claimed, enter the amount upon the collector’s roll and the collector shall proceed to collect the amount from the goods and chattels and the estate or interest in the lands of the person liable in the same way, as nearly as may be, as municipal taxes are collected.”

Under this section the lien and charge is “upon the estate or interest in such land”. The wording of this section is different from that of s. 98 of The Assessment Act, R.S.O. 1950, c. 24, which provides that: “The taxes due upon any land with costs . . . shall be a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown. . . .”

A similar question arose with respect to the provincial corporation tax in *The Trusts and Guarantee Company Limited v. The Lake Shore Country Club Limited*, [1945] O.W.N. 3. In that case the plaintiff’s argument was that the defendant’s property consisted of an equity only, since it had parted with the legal estate by deed (the bond mortgage), and this view was sustained.

In the present case the amount due the Commission was entered upon the collector’s roll as provided by s. 30(2). Counsel

for the Commission relies on the provisions of subs. 2 that "the collector shall proceed to collect the amount from the goods and chattels and the estate or interest in the lands of the person liable in the same way, as nearly as may be, as municipal taxes are collected", taken in conjunction with subs. 1 and with s. 98 and other sections of The Assessment Act, and also with the definition of "land" in s. 1(i) of The Assessment Act. He submits that s. 30 of The Public Utilities Act provides for the collection of public utility charges as taxes, when they are on the collector's roll, and that as such they become the subject-matter of a special lien on the land under s. 98 of The Assessment Act.

Counsel for the claimant refers to *Re General Fireproofing Company of Canada, Ltd.*, [1937] S.C.R. 150, [1937] 2 D.L.R. 30, 18 C.B.R. 159, and to *Howe v. City of Port Arthur* (1922), 23 O.W.N. 190. The second of these cases was decided on 26th October 1922. At that time the corresponding section of The Public Utilities Act, R.S.O. 1914, c. 204, s. 27, was as follows: "The sum payable by the owner or occupant of any building or lot for the public utility supplied to him there . . . shall be a lien or charge on the building or lot and may be levied and collected in like maner as municipal rates and taxes are recoverable." The section was amended by 1924, c. 61, s. 4, and again in R.S.O. 1927, c. 28, s. 20(2), to its present form, creating "a lien and charge upon the estate or interest in such land of the person by whom the amount is due." The case of *Howe v. City of Port Arthur* is therefore inapplicable under the present wording of the section.

Counsel for the claimants refers to the *General Fireproofing* case, particularly the third paragraph of the S.C.R. headnote, and the reasons for judgment of Davis J., the last paragraph on p. 161 and the third paragraph on p. 166. That case, however, dealt with priorities under The Bankruptcy Act and not those with relation to a deed of trust and mortgage, as in the present case, and so is not applicable to the facts involved in the case at bar. Further, the claim of the City of Toronto was for business taxes and for the supply of electrical energy. Davis J. said at p. 162: "The city's claim is for business taxes. There is no lien or charge upon the property of the taxpayer to secure the payment of business taxes as there is in the case

of land taxes, nor is there any lien or charge to secure the payment of the charges of the Toronto Electric Commissioners. The city therefore has to rely upon the provisions of sec. 112(11) of the Ontario *Assessment Act*. This remedy is really a substitute for distress where personal property liable to seizure for taxes, or the undistributed cash proceeds thereof, are taken or held in the course of execution or liquidation." Again, the assets of the bankrupt in that case consisted (see headnote) of personal property, and there was no land, as in the present case.

Counsel for the claimants also refers to s. 72(1) of The Power Commission Act, R.S.O. 1950, c. 281. The marginal note opposite this section reads: "Lien for rates to be postponed on mortgages or leases prior to entry on roll." He submits that if it had been intended that the lien created by s. 30(1) of The Public Utilities Act should be postponed to prior mortgages it would have been specially mentioned, as is done in s. 72(1) of The Power Commission Act. It might be argued, on the contrary, that the provision in s. 30(1), "shall be a lien and charge upon the estate or interest in such land", has a similar effect in preserving the priority of such mortgages.

There is a presumption that an alteration in the language used in a subsequent statute is intentional. In Craies on Statute Law, 5th ed. 1952, at p. 133, it is said: "... if we find that the language employed by the Legislature in the earlier statutes on a particular subject has been departed from in a subsequent statute relating to the same subject, it is generally, but not always, a fair presumption that the alteration in the language used in the subsequent statute was intentional." In a footnote the author quotes from *The City of Ottawa v. Hunter* (1900), 31 S.C.R. 7 at 10, where Taschereau J. said: "... when we see in statutes *in pari materia*, by the very same legislature, additional words of that nature to a prior enactment, we would be setting at naught the very clear intention of the legislature if we gave to the last enactment the same construction that had been judicially given to the prior one. . . . We cannot so read out of a statute expressions that must be held to have deliberately been inserted so as to make the new statute different from the old one." Consequently there is a presumption that when the statute was amended as above set out it was the in-



tention of the Legislature to change and restrict the nature of the lien.

It will be noticed that the taxes referred to in s. 98 of The Assessment Act are "the taxes due upon any land". In Manning on Assessment and Rating, 3rd ed. 1951, at p. 385, the author says: "Generally speaking taxes are not a lien upon property unless made so by statute. There is therefore no very effective specific lien in respect of business taxes. In Ontario and in most, if not all, of the other Provinces taxes due upon land are 'a special lien on the land in priority to every claim. . . .' It is to be noted that this covers only taxes assessed upon land itself and does not cover taxes assessed upon some person with reference to but not directly upon the land." And again at p. 386: "Although a tax secured by a lien on land may not be a tax on land, for the lien may be merely an appropriate regulation to secure its collection and the form of collecting a tax cannot alter its nature, yet taxes of the nature imposed by the Assessment Acts are taxes on land in so far as any lien upon lands exists in respect thereof."

Section 4 of The Assessment Act provides: "All real property in Ontario shall be liable to taxation subject to the following exemptions. . . ." Section 30(1) provides: "Land occupied by the owner shall be assessed against him." The words "taxes due upon any land" in s. 98 in my opinion mean taxes assessed against the land by reason of ss. 4 and 30. By contrast business taxes under s. 6(11) of the Act "shall not constitute a charge upon the land occupied or used". As stated in the passage quoted from Manning, the special lien "covers only taxes assessed upon the land itself", that is, s. 98 applies only to taxes assessed upon the land itself. The taxes referred to in ss. 126 *et seq.* of The Assessment Act, under the heading "Arrears of Taxes Accrued on Land", and in ss. 143 *et seq.* under the heading "Sale of Lands for Taxes", are, in my opinion, the taxes which by s. 98 are secured by a special lien on the land assessed. These sections are not applicable, for example, in the case of business taxes.

Section 30(2) of The Public Utilities Act provides that "the collector shall proceed to collect the amount from the goods and chattels and the estate or interest in the lands of the person liable in the same way, as nearly as may be, as municipal taxes

are collected". Sections 108 *et seq.* of The Assessment Act set out the duties of the collector; ss. 114 *et seq.* set out the provisions with respect to distress for recovery of taxes; s. 120 provides that the collector shall return his roll to the treasurer. The provisions of ss. 126 *et seq.* and ss. 143 *et seq.*, providing for the sale of land for taxes, come into effect "after the time appointed for the return and final settlement of the collector's roll" (s. 126), and refer to the treasurer, as in s. 143, "The treasurer shall not sell any lands for taxes", etc.

Thus it would appear that s. 30(2) of The Public Utilities Act deals chiefly with the means for collection of taxes by the collector, as set out in The Assessment Act, namely, *inter alia*, by distress. In *Laughtenborough v. McLean* (1864), 14 U.C.C.P. 175 at 180, Adam Wilson J. said: "The collector's roll is made, not for the purpose of creating a charge, but for the purpose of collecting a charge already made by the assessment roll." It would seem to follow that the lien created by The Public Utilities Act would not be extended by the act of entering the charge on the collector's roll.

Section 30(1) also provides that the account may be collected by distress upon the goods and chattels of the person and by the sale of his estate and interest in the land. In the present case the lands are subject to the bond mortgage, and it would therefore appear that the municipal corporation could sell only the equity of redemption in the land in order to realize on its lien, and that it was not intended that the right should be extended to enable the municipal corporation to sell the land free from the mortgage by following the procedure prescribed by s. 30(2). It will also be noticed that the qualifying words "as nearly as may be" are contained in subs. 2; in other words, the remedies provided by The Assessment Act for the collection of taxes may be used in so far as they may be adapted to the rights arising under The Public Utilities Act. See Craies, *op. cit.*, p. 106: "Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes: Imposing a tax or charge; Conferring or taking away legal rights, whether public or private; Excepting from the operation of or altering clearly established principles of law; Altering the jurisdiction of Courts of law."

In my opinion, therefore, the lien of the claimants, with the exception of the claim for water rates, is subject to the claim of the plaintiff under the deed of trust and mortgage, and I so find.

As to a claim by reason of s. 114(11) of The Assessment Act\*, in my opinion the case of *In re P. W. Ellis Company Limited; Ex parte City of Toronto* (1929), 10 C.B.R. 491, 36 O.W.N. 202, is applicable, as are *Donahue v. Campbell* (1901), 2 O.L.R. 124, and *Riverdale Garage Limited v. Village of Norwich* (1923), 53 O.L.R. 499. In the *Ellis* case Garrow, Official Referee, said at pp. 493-4:

"Mr. Herapath [counsel for the City of Toronto] . . . contends first that the personal property must be regarded, at the time the notice was given by the city, as having been in the language of the section, 'claimed by,' even if not in the actual possession of Mr. Clarkson as liquidator, so long as there remained, theoretically, a possibility of redemption, no matter how remote. My answer to that would be that the only claim the liquidator could have made would be to the equity of redemption in the property, which is simply to say that the title of the mortgagee was paramount to that of the liquidator. If there is any surplus after the bonds are paid it is not contended here that the taxes in question should not rank in priority as against such surplus.

"Secondly, Mr. Herapath contends that if the proceeds are to be regarded as I think they must be, as being in the possession of Mr. Clarkson *qua* receiver on behalf of the bondholders, then the words in the subsection 'or of any trustee' include a receiver such as Mr. Clarkson and the section applies.

"I disagree with this contention also. The whole phrase must be read together, 'or of any trustee or authorized trustee in bankruptcy,' both referring, I think to a case of bankruptcy; and I cannot bring myself to believe, what Mr. Herapath's argument implies, that a trustee for a mortgagee claiming or being in possession of chattel property, is in a worse position than the mortgagee himself would have been had he taken possession of the mortgaged property. . . .

"I think it must be taken that at and prior to the giving of the notice the personal property, subsequently sold, was in the

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\*This subsection is quoted in the reasons of LEBEL J., *infra*.



possession of the receiver for the bondholders under the mortgage, and that the legal estate thereto was in the Royal Trust Company [trustee for the bondholders] subject to the prior claim of the Bank of Montreal and that being so it was not liable to seizure for taxes at the date the notice was given."

Applying the principles set out in the above cases it is my opinion that the claim of the Corporation of the City of London and the Public Utilities Commission, with the exception of the claim for water rates, is subject to the claim of the plaintiff under the deed of trust and mortgage, and I so find.

As to the claim for water rates: During the course of the argument counsel referred me to The London Water-works Amendment Act, 1878 (Ont.), c. 27, s. 1. Under this section the sum payable for water supplied "shall be a lien and charge on such house, tenement," etc. Counsel said they would let me know if this statute was still in effect. If so, the claim for water supplied would rank ahead of the plaintiff's claim under the deed of trust. This part of the claim may be spoken to.

8th January 1953. COOK, MASTER:—Since giving reasons for judgment herein dated 19th December 1952 I have been attended by counsel for the claimants and for the plaintiff.

Counsel for the claimants has referred to s. 12a of The London Water-works Act, 1873 (Ont.), c. 102, as re-enacted by s. 1 of the Act of 1878, and also to s. 3 of The City of London Act, 1909, c. 27. He states that these sections have not been expressly repealed and that special legislation would be required to deprive the City of rights provided for thereunder.

Counsel for the plaintiff refers to ss. 26 and 39 of The Public Utilities Act. Section 26 provides that: "This Part shall apply to all municipal corporations owning or operating public utilities." Section 39 provides: "A commission established under *The Municipal Light and Heat Act* or *The Municipal Waterworks Act*, being chapters 234 and 235 of the Revised Statutes of Ontario, 1897, or under a special Act for the construction or the control and management of works for the manufacture, production or supply of any public utility shall be deemed to be a commission established under this Part and the provisions of this Part shall apply to it."

Under s. 26, Part III is applicable to all municipal corporations operating public utilities, and under s. 39 it is applicable

to "a commission established under a special Act", as is the case with the Public Utilities Commission of the City of London.

Sections 25 and 34(2) of The Public Utilities Act, 1913 (Ont.), c. 41, correspond to ss. 26 and 39 of the present Act, and they appear to have been new in 1913. Section 27 of the 1913 Act corresponds to s. 30 of the present Act, but the lien there provided for was similar to that under s. 12 of The London Water-works Act, 1873, as amended. Therefore The Public Utilities Act, 1913, did not change the nature of the lien theretofore provided. Subsequently, however, The Public Utilities Act has been amended from time to time and the nature of the lien provided for has been changed to its present form.

Consequently, in my opinion, the rights of the claimants would be governed by s. 30 of the present Act, and the lien or charge would be limited as provided in that section, and in my opinion the sections of the statutes referred to by counsel for the claimants are superseded by the present Act. If it had been intended that these rights should be preserved, special exceptions or reservations might have been inserted in the statutes, as, for example, in s. 15 of The Municipal Light and Heat Act, R.S.O. 1897, c. 234 ("Nothing in this Act shall be construed to diminish the rights of any company under any special Act. . ."); The Public Utilities Act, 1913, s. 62; and s. 40(4) of the present Act.

In *Humphreys v. The City of London*, [1935] O.R. 91 at 94-5, [1935] 1 D.L.R. 300, affirmed with a variation [1935] O.R. 295, [1935] 3 D.L.R. 39, Kerwin J. said: "I understand that counsel agree that the Water Commissioners are within the purview of The Public Utilities Act. . . . The Commission is still the statutory agent of the municipality."

Counsel for the plaintiff has also referred to *Toronto Electric Commissioners v. Snider*, 55 O.L.R. 454 at 469, [1924] 2 D.L.R. 761 at 779, reversed on other grounds, [1925] A.C. 396, [1925] 2 D.L.R. 5, [1925] 1 W.W.R. 785, and Burrows, Interpretation of Documents, 2nd ed. 1946, p. 51.

I find therefore that the claim of the Corporation of the City of London and of the Public Utilities Commission of the City of London, including the claim for water rates, is subject to the

claim of the plaintiff under the deed of trust and mortgage. Costs of both parties should be paid out of the money in court.

*Report accordingly.*

25th February 1953. The appeal was heard by LEBEL J. in Weekly Court at Toronto.

*G. W. Mason, Q.C., and J. S. Boeckh, for the appellants.*

*D. O. Mungovan, for the plaintiff, respondent.*

17th April 1953. LEBEL J. [after stating the nature of the appeal]:—The issue here is with respect to a claim by the Public Utilities Commission of the City of London and the municipal corporation of that city to outrank the trustee in the matter of some \$12,716 owing to the Commission for electric light, power and water supplied to the company. The learned Master has found and reported that the Commission ranks subsequent to the charge effected by the indenture and hence that the claim to priority is not well founded. Counsel for the Commission maintain that his conclusions are wrong in several respects.

The Commission's account against the company was incurred in 1948. According to the affidavit of its office manager, the clerk of the Corporation of the City of London was notified of the amount then due by the company and of the lands upon which a lien was claimed "pursuant to sec. 30 of The Public Utilities Act". The amount was thereupon entered upon the collector's roll for the City of London for the year 1949. The indenture of trust and mortgage is dated 15th December 1946. The writ of summons in this action was issued on 21st March 1950. On 5th April 1950 a receiver and manager of the company's undertaking, property and assets was appointed, and by order of this Court, dated 10th January 1952, it was declared that the trustee was entitled to a first mortgage and charge thereon.

The learned Master agreed that the Commission was entitled to the lien mentioned in s. 30 of The Public Utilities Act, R.S.O. 1950, c. 320, which, in the plain language of the section, is a lien and charge upon "the estate or interest in [the] land of the person by whom the amount is due". He found, therefore, that such estate or interest was subject to the charge created by the indenture, and declined to hold that the Commission was



entitled to the benefit of any broader lien, such as the "special lien" existing under s. 98 of The Assessment Act, R.S.O. 1950, c. 24, which is a lien upon land that has priority over "every claim, privilege, lien or encumbrance of every person except the Crown". In arriving at this conclusion he was thus of the opinion that the amount due the Commission from the company never became municipal taxes, even after the amount due had been entered on the collector's roll, and hence that the Commission was not entitled to the benefit of the "special lien" on land expressly available for the collection of municipal taxes.

I find myself in complete agreement with the construction placed upon subss. 1 and 2 of s. 30 of The Public Utilities Act by the learned Master. The subsections read:

"(1) The amount payable to a municipal corporation or to a public utility or hydro-electric commission of a municipality or to The Hydro-Electric Power Commission of Ontario for a period not exceeding three months by the owner or occupant of any lands for the public utility supplied to him for use thereon *shall be a lien and charge upon the estate or interest in such land of the person* by whom the amount is due and may be collected by distress upon the goods and chattels of the person and *by the sale of his estate and interest in the lands.*

"(2) The clerk of the municipality shall, upon notice to him of the amount due and of the person by whom it is due and of the lands upon which a lien is claimed, enter the amount upon the collector's roll and *the collector shall proceed to collect the amount from the goods and chattels and the estate or interest in the lands of the person liable in the same way, as nearly as may be, as municipal taxes are collected.*"

The question whether the concluding language of subs. 2 is to be construed to mean that the amount due for public utilities is to be deemed municipal taxes after entry on the collector's roll has, it seems, never been decided before. The problem was referred to, I find, by Orde J. A. in *Re D. S. Paterson Co.*, [1932] O.R. 432 at 438, [1932] 3 D.L.R. 279, 13 C.B.R. 428. That very learned judge said:

"Whether or not sums due for public utilities, when so entered on the collector's roll are to be deemed to be taxes within the meaning of s. 112(11) of the Assessment Act and so entitled upon the bankruptcy of the debtor to priority over other

claims, we are not called upon now to decide. I am of the opinion that, at all events, no such right can arise until the amount has been entered upon the collector's roll. It is only in that case that collection may be made 'in the same way as municipal taxes are collected.' Where the right of the municipality or the public utilities commission depends upon its mere right to distrain directly then there is no foundation for the contention that the public utilities rates are in the same category as taxes."

It is plain from the passage just quoted that Orde J.A. was of the opinion, though he felt it unnecessary to decide the point, that public utility rates are not in the same category as taxes, and that at all events there could be no parallel between such rates and taxes, until the amount due had been entered on the collector's roll. The point was also touched upon in *Re General Fireproofing Co. of Canada Ltd.*, [1936] O.R. 510, [1936] 4 D.L.R. 88, 17 C.B.R. 371, varied [1937] S.C.R. 150, [1937] 2 D.L.R. 30, 18 C.B.R. 159, and in *Re Decker's Delicatessen*, 56 O.L.R. 140, [1925] 1 D.L.R. 652, 5 C.B.R. 208. These two cases, like the *D. S. Paterson Co.* case dealt with by Orde J.A. involved priorities in bankruptcy proceedings and were concerned with problems involving the debtors' goods as distinct from land—a distinction of considerable importance — and the section of The Assessment Act primarily considered in each case was what is now s. 114(11). What each of the three cases decided, in effect, was stated by Davis J. in the Supreme Court of Canada in the *General Fireproofing* case, at pp. 161-2:

"Now as to the City of Toronto. The Toronto Electric Commissioners are merely the statutory agent and manager of one of the city's public utilities and will stand in the same position as the city unless the charges for the supply of electrical energy cannot be said to come within the words 'taxes, rates or assessments' in sec. 125 of the *Bankruptcy Act*."

At p. 166 he concluded that the Commissioners and the City stood in the same position, the rates having been entered on the collector's roll, because the charges for the supply of a public utility came within the words "taxes, rates or assessments" as used in The Bankruptcy Act.

Those authorities thus do not assist since, as I have already indicated, the problem here is concerned primarily with the

priority of liens or charges upon *land*, and no sections of The Bankruptcy Act are now involved.

The first question which naturally arises is: What was the intention of the Legislature as expressed in the concluding words of s. 30(2)? Do they mean that after the amount due for public utilities has been entered on the collector's roll it is to be deemed municipal taxes, and that as incidental to the collection thereof the lien and charge so clearly described in s. 30(1) is to give place to the special lien provided for in s. 98 of The Assessment Act? In my view that is too wide-sweeping an assumption, but, whether it is deemed to be taxes or not, the collector, in the language of s. 30(2) "shall proceed to collect the amount from . . . the estate or interest in the lands of the person liable." It is clearly "from" this estate and interest only that the collector may recover the amount due "in the same way, as nearly as may be, as municipal taxes are collected."

Had the intention been to substitute the "special lien" for the narrower lien under s. 30 once the amount due had been entered on the collector's roll, is it not to be expected that the Legislature would have said so in plain language? Unless a contrary intention is to be gathered from the section, and I am unable to find one, the collector, in my opinion, must proceed to collect the amount due for the supply of a public utility with the assistance of the lien provided in the section and no other. "It is a well settled rule of law that a lien shall not be considered to be imposed without a plain declaration of the intention of the Legislature to impose it, and the intention to impose must be shown by clear and unambiguous language": *Re Robert W. J. Bolus Co. Ltd.; Ex parte Workmen's Compensation Board et al.*, [1934] O.R. 231 at 238, [1934] 2 D.L.R. 609, 15 C.B.R. 406, citing *The Oriental Bank Corporation v. Wright* (1880), 5 App. Cas. 842, and *Re Hardy*, 62 O.L.R. 367, [1928] 3 D.L.R. 255, 10 C.B.R. 107, affirmed 63 O.L.R. 246, [1929] 1 D.L.R. 300, 10 C.B.R. 288. I am satisfied that that principle is applicable where the lien sought to be established is a different lien from the one expressly described.

In my opinion subs. 2 does no more than authorize and direct the designated municipal officer to collect the amount due to the Commission. Were it not for this subsection, they would be without such authority, and the Commission would have to



act as its own collector and enforce the lien given to assist it by subs. 1.

Finally, as was said in *Laughtenborough v. McLean* (1864), 14 U.C.C.P. 175 at 180: "The collector's roll is made, not for the purpose of creating a charge, but for the purpose of collecting a charge already made. . . ."—here, the charge made by subs. 1.

Some distinction seems to have been drawn during the argument before the learned Master between the Commission's charges for light and power on the one hand, and for water on the other, but the point does not appear to have been pressed, and it was not dealt with in argument before me.

The second phase of this matter was not before the learned Master, but upon consent it is now urged on behalf of the Commission that since the trustee has sold the company's assets and realized upon certain machinery and chattels, the Commission is entitled under s. 114(11) of The Assessment Act to priority for so much as has been realized from that source.

The subsection reads:

"Where personal property *liable to seizure for taxes as hereinbefore provided* is under seizure or attachment or has been seized by the sheriff or by a bailiff of any court or is claimed by or in possession of any assignee for the benefit of creditors or liquidator or of *any trustee* or authorized trustee in bankruptcy or where such property has been converted into cash and is undistributed, it shall be sufficient for the tax collector to give to the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy, notice of the amount due for taxes, and in such case the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy shall pay the amount to the collector in preference and priority to any other and all other fees, charges, liens or claims whatsoever."

The short answer to this contention is the conclusion apparently reached by the learned Master, which I adopt, namely, that at no stage do a public utility's rates or charges become municipal taxes. Furthermore, a comparison of s. 27(1) of The Public Utilities Act, empowering a public utility to pass by-laws "to fix the rates or charges", with ss. 33 *et seq.* of The Assessment Act, providing for the imposition of municipal

taxes, demonstrates that such rates or charges are not in the same category as taxes. Certainly they are not the taxes "hereinbefore provided" in s. 114(11). Moreover, it may well be, as counsel for the plaintiff argues, that the words "any trustee" in this subsection do not include a trustee for bondholders, who, like any other mortgagee of land, is a secured creditor.

The last branch of the matter presents more difficulty. It has to do with the present force or validity of a section in a private or special Act entitled "An Act for the construction of Water-Works for the City of London", (1873) 36 Vict. (Ont.), c. 102 (Given the short title The London Water-Works Act, 1873, by s. 13 of the 1878 amending Act), as amended by 1878, c. 27, s. 1. By the amendment two new sections, 12 and 12*a*, were substituted for the original s. 12, and counsel for the Commission rely on the second of these. They read:

"12. The commissioners shall also have power and authority from time to time to fix the rate or rent to be paid for the use of the water by hydrants, fire-plugs and public buildings.

"12*a*. The sum payable by the owner or occupant of any house, tenement, lot, or part of a lot, for the water supplied to him there, or for the use thereof, shall be a lien and charge *on such house*, tenement, lot, or part of a lot, and may be levied and collected in like manner as municipal rates and taxes are by law recoverable."

It seemed to be assumed in argument that the lien created by this old s. 12*a* had priority over encumbrances like the special lien on land under s. 98 of The Assessment Act, and I shall proceed upon that assumption, although I realize that in doing so I am treating the "rent or rates" mentioned in s. 12 as taxes.

Mr. Mason's contention is that whatever meaning and effect s. 30 of The Public Utilities Act may have, the lien on the owner's "house or lot" is still in effect for the benefit of the Public Utilities Commission of the City of London. The learned Master has expressed a contrary view. His opinion is that this ancient bit of legislation has been superseded by The Public Utilities Act, enacted originally as 1913, c. 41, and in particular by an amendment to that Act made by 1927, c. 28, s. 20(2). In other words he has concluded that s. 12*a* has been repealed by implication.

Before proceeding further, I think that I should refer briefly to the history of this private legislation. The special Act of 1873 provides for the appointment of water commissioners for the City of London, who are to construct the waterworks and manage, maintain and conduct them. In 1909, by 9 Edw. VII, c. 110, s. 3, the water commissioners were given the same powers with respect to the City's electric light plant, and by amending legislation before or after that year were entrusted with the management and control of public parks and given other powers extraneous to the supply of public utilities. I understand that these additional powers are still exercised by the Commission under authority of these statutes. There are, of course, no water commissioners for the City of London now; they have been replaced by the members of the Public Utilities Commission of the City of London.

The water commissioners were required by s. 13 of The private Act of 1873 to pay the rates or rents they collected, less disbursements, monthly to the treasurer of the City of London. From that time until 1913 or 1914 they "levied" their rates or rent, acted as their own collector and enforced their lien. The rates or rents were not entered on the collector's roll and the collector was not bound to collect them.

In support of his argument Mr. Mason laid emphasis upon s. 7 of The City of London Act of 1914, 4 Geo. V, c. 74, which reads: "The name of the said The Water Commissioners for the City of London, (hereinafter called the Commissioners) is hereby changed to 'the Public Utilities Commission of the City of London,' but such change in name shall not, in any way, impair, alter or affect the rights, powers, immunities, duties or liabilities of the Commissioners, nor in any wise affect any suit or proceeding now pending or judgment existing either by, or in favor of, or against the Commissioners, which, notwithstanding such change in the name of the Commissioners, may be prosecuted, continued, completed and enforced as if this Act had not been passed.'

But this section does not, in my opinion, touch upon the subject of the lien on land created by s. 12*a*, for that lien's existence is not dependent upon the exercise of any power and authority in, or in the discharge of any duty imposed upon, the water commissioners. It is the creature of the Act of 1878



and it may have been repealed by The Public Utilities Act of 1913, and particularly by the 1927 amendment, as the learned Master has found, without in any way affecting either the power, the authority or the duties of the water commissioners or their successors. And whether this s. 7 of the private Act of 1914 was strictly necessary is a moot question in view of the language of s. 34, especially subs. 2, of the original Public Utilities Act of the year before. However, I shall assume that it was since, as I have said, the commissioners had also been entrusted with the management of public parks and other things. Section 34(2) is now, with slight immaterial variations, s. 39 of the present Public Utilities Act, which reads:

“A commission established under *The Municipal Light and Heat Act* or *The Municipal Waterworks Act*, being chapters 234 and 235 of The Revised Statutes of Ontario, 1897, or under a special Act for the construction or the control and management of works for the manufacture, production or supply of any public utility shall be deemed to be a commission established under this Part and the provisions of this Part shall apply to it.”

This section brings me to what is perhaps the crux of Mr. Mungovan's argument on behalf of the trustee, for the Part of the Act referred to in its concluding words is Part III, which includes the important s. 30. The submission is, then, that the water commissioners appointed under the provisions of the private Act of 1873 constituted “a Commission” within the meaning of s. 39, and the lien now provided for in s. 30 is the only lien enforceable by the Commission.

It is of importance to the case for the trustee to appreciate that when The Public Utilities Act was first enacted in 1923 it contained a section, namely, s. 27, also then within Part III, which read: “The sum payable by the owner or occupant of any building or lot, for the public utility supplied to him there, or for the use thereof, and all rents, rates, costs and charges by this Act to be collected in the same manner as rents or rates for the supply of a public utility shall be a lien and charge on the building or lot, and may be levied and collected in like manner as municipal rates and taxes are recoverable.”

The phraseology of this section is strikingly like that of s. 12a of the private Act, so much so that it seems that the latter subsection must have been before the draftsman of s. 27. At all

events, the lien on land under The Public Utilities Act when first enacted, and until s. 27 was amended in 1927 by c. 41, s. 20(2), was to all intents and purposes the same lien as is found in s. 12a of the private Act; and s. 20(2) is now s. 30. In the result, "the lien and charge on the building or lot" disappeared in 1927 and was replaced by the present lien "on the interest or estate in the lands of the person". The question then is, did the substitution of what is now s. 30 of The Public Utilities Act repeal s. 12a of the private Act by implication? I find myself again in agreement with the learned Master. I think it did.

Counsel for both sides have referred me to Part II, Chapter V, of Craies on Statute Law, 5th ed. 1952, and to the many authorities referred to by the learned author. The principles are plainly stated by him and the general rule of law on the subject is put thus by North J. in *In re Williams; Jones v. Williams* (1887), 36 Ch. D. 573 at 578:

" . . . the provisions of an earlier Act may be revoked or abrogated in particular cases by a subsequent Act, either from the express language used being addressed to that particular point, or from implication or inference from the language used."

"What words", said Dr. Lushington in *The "India"* (1864), Brown. & Lush. 221 at 224, 167 E.R. 345, "will constitute a repeal by implication, it is impossible to say from authority or decided cases. If, on the one hand, the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would be declared in express terms; so, on the other hand, it is not necessary that any express reference be made to the statute which is to be repealed."

" . . . special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together.": *Kutner v. Phillips*, [1891] 2 Q.B. 267 at 272, per A. L. Smith J., quoted with approval in *The Aberdeen Suburban Tramways Company v. The City of Aberdeen*, [1927] S.C. 683; *In re Berrey*; *Lewis v. Berrey*, [1936] Ch. 274; *In re Chance*, [1936] Ch. 266, 270.

In my view s. 34(2) of the original Public Utilities Act of 1913, now s. 39, is such a reference. It expressly refers to a commission established under a special Act and makes the provisions of Part III apply to it. The language is general, it is

true, but the reference to this type or kind of commission is specific. Furthermore, I am satisfied, as Mr. Mungovan argued, that there is a necessary inconsistency between the lien under s. 30 and the lien under s. 12a of the private Act. They cannot, in my view, exist together, for the lien under s. 12a is said to have priority over encumbrances, etc., and the other is a lien which clearly has not.

In conclusion, I should say that The Public Utilities Act of 1913 was, in strictness, not a codification, since it was not intended to be a mere code of existing law. However, as Part III, and particularly s. 34(2), thereof shows, the Act was designed to bring within its confines all municipal corporations supplying public utilities, and all commissions established by them for the same purpose, and hence was a consolidation of public utility law in this Province. Thus, when s. 27 of this Act was repealed by the Act of 1927, and what is now s. 30 took its place, s. 12a of the private Act was also repealed.

(The italics in the various sections quoted are mine.)

The appeal is dismissed with costs.

*Appeal dismissed with costs.*

*Solicitor for the appellants: H. R. Davidson, London.*

*Solicitors for the plaintiff, respondent: Mungovan & Mungovan, Toronto.*

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## [COURT OF APPEAL.]

**Munroe et al. v. The City of Ottawa.**

*Negligence — Dangerous Premises — Allurement to Children — Child Incapable of Contributory Negligence—Adequacy of Supervision by Parents—Permission to Child to be on Premises.*

The infant plaintiff, aged 4½ years, lived with his parents and grandmother in a suite of rooms in a building owned by the defendant corporation. The grandmother was the tenant of the suite, and on her taking possession the superintendent or janitor allotted to her one wash-basin in a room containing a number of basins. The child, while in this room one day, fell through a window adjacent to a platform on top of the basins which the jury found, in the circumstances, amounted to an enticement or allurement to young children, and existed to the knowledge of the defendant. The child was injured, and an action was brought by him and by his father for out-of-pocket expenses.

*Held*, on the evidence, the plaintiffs were entitled to judgment. The jury's findings (which were supported by the evidence) were in effect that the infant was on the premises on the occasion in question with the permission of the defendant; that there was a hidden danger which was an allurement or enticement to the infant; that this danger was known to the defendant; that there was a breach of duty on the part of the defendant in failing to protect the window, and that this breach of duty was the cause of the injury. There was no justification on the evidence for holding that the permission to the infant was limited either to his being in the washroom only while washing, or to his going there only if accompanied by an adult. *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229; *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398, applied; *Pianosi et al. v. Canadian National Railway Company*, [1943] O.W.N. 766, distinguished.

*Per Hogg J.A., dissenting in part:* The jury's attention should have been directed to the evidence dealing with the care taken by the boy's parents to protect him from a danger known to them, and their obligation in this respect should have been clearly explained to them. Since their failure, if any, in this respect, might amount to contributory negligence on the part of the adult plaintiff, and this issue was not put to the jury, there should be a new trial in respect of that plaintiff's judgment.

*Appeals — Allegations of Non-direction and Misdirection — Effect of Failure to Object at Trial.*

*Per Hogg J.A.:* Although there is no absolute rule prohibiting an appellate Court from entertaining an argument on a matter not raised at the trial, there are several decisions to the effect that ordinarily a new trial will not be granted on a ground in respect of which no objection was taken at the trial. *Adams v. Windsor Truck and Storage Co.* (1920), 48 O.L.R. 446; *Wilson et al. v. United Counties Bank, Limited*, [1920] A.C. 102; *Thompson v. Fraser Companies, Limited*, [1930] S.C.R. 109, referred to.

AN APPEAL by the defendant from the judgment of Spence J., entered on the findings of a jury.

2nd and 3rd March 1953. The appeal was heard by PICKUP C.J.O. and HOGG and AYLESWORTH JJ.A.

*F. J. Hughes, Q.C.*, for the defendant, appellant: There was a weekly lease of the demised premises with a \$35 monthly

service-charge which was the equivalent of rent. In the lease the lessee agreed that the premises were in good order and repair, and covenanted to repair and to conform to all rules and regulations and not to keep boarders, roomers or lodgers without the written consent of the lessor. [PICKUP C.J.O.: Where did the tenant get the right to be in the washroom?] This child had no right whatever to be there. He was a trespasser when wandering around in the wash-basin room unattended by an adult. The wash-basin room and the toilet room were not demised; the tenants used them by permission. If the infant was a licensee in Mrs. Dorion's suite (which is not admitted, since there was never a consent in writing from the lessor, as required), he had no semblance of a licence to play in the wash-basin room or on the wash-basin counter. As pointed out in *Pianosi et al. v. Canadian National Railway Company*, [1943] O.W.N. 766, [1944] 1 D.L.R. 161, 56 C.R.T.C. 218, a general licence does not necessarily extend to a child too young to take care of himself.

In any event, our submission is that the infant plaintiff was a trespasser anywhere in the building, since he and his parents must be considered as boarders or lodgers of Carolina Dorion, the lessee.

If there was any licence to the infant plaintiff to go into the wash-basin room, it should be limited to permission to go there if accompanied by an adult. There was nothing there that would constitute a hidden danger, allurement or enticement to an adult: *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398 at 407, 414, 415. Moreover, there is no evidence that the infant fell off the platform: *Cousins v. Loblaw Groceries Ltd.* (1927), 33 O.W.N. 182; *Wakelin v. The London and South Western Railway Company* (1886), 12 App. Cas. 41; *Drinkwater v. Morand*, 64 O.L.R. 124, [1929] 4 D.L.R. 421. [PICKUP C.J.O.: What is the significance of that point?] The suggestion throughout the trial was that the infant was attracted to this platform, and that he climbed on to it and fell off. If this was not the case, there was no allurement. I refer also to *Burchell v. Hickisson* (1880), 50 L.J.C.P. 101. The child had not gone into the room on this occasion to wash, and he had been forbidden by his mother to use the wash-basin room alone.

The jury were prejudiced by the trial within the trial of a collateral issue as to the death of a woman 81 years of age

who took ill months before this accident and was found on the ground below an open window. This evidence should not have been admitted. [PICKUP C.J.O.: If you are right in that, must there be a new trial?] I had hoped to avoid a new trial.

There was no evidence that the Munroe children ever played in the wash-basin room before this accident, nor was there evidence that the infant plaintiff had ever been there without an adult. There was no evidence that the other children who were used to playing in the room were as young as the infant plaintiff, or unable to take care of themselves. There was not sufficient evidence to constitute leave or licence to the infant plaintiff to be in the room.

*A. T. Hewitt*, for the defendant, appellant: There must be some connection, even if the jury were justified in their finding of a trap or allurement, between that and the damage. There is no more than speculation that this child fell.

*K. G. Morden, Q.C.*, for the plaintiffs, respondents: Being members of the lessee's family these plaintiffs could not be regarded as boarders or lodgers. The grandmother moved in first, and her daughter and the two plaintiffs moved in a few weeks later. This issue is not raised in the pleadings.

The wash-basin room and the toilet room are in the same category as stairways or halls. The tenants did not have exclusive possession, but they had a right to be there. They could not be trespassers in the halls or on the stairs, or in the wash-basin room. There was no evidence that anyone was ever told to keep the children out of this room, and the janitor gave evidence that he had seen children playing there. Infants are a special class, as is shown by the railway cases. Children are usually held to be licensees, even in circumstances in which an adult would be considered a trespasser. It has never been necessary for an infant plaintiff to show that he himself had been on the premises before and that his presence there was tolerated; it is sufficient to show that other children had been permitted to be on the property, or seen there. The jury expressly found, and rightly, that the infant plaintiff was a licensee: *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74 at 85, 92; *Robert Addie and Sons (Collieries), Limited v. Dumbreck*, [1929] A.C. 358 at 371; *Guindon v. Julien*, [1940] O.R. 346, [1940] 3 D.L.R. 152.



The defendant owed the infant plaintiff a duty not to expose him to a hidden danger or trap, known to the defendant. The duty that the owner of premises owes to persons to whom he gives permission to enter must be measured by the owner's knowledge, actual or imputed, of the habits, capacities and propensities of those persons; *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229 at 238; *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253 at 276. The degree of danger and the extent to which it is concealed may vary from case to case, and its ultimate determination is a matter of fact for which the jury is the appropriate tribunal: *Fairman v. Perpetual Investment Building Society*, *supra*. Things that are not an unusual danger or trap for an adult may very well be so for a child, and accordingly steps must be taken by lighting, guarding or otherwise to prevent them from being dangerous to children: Charlesworth on Negligence, 2nd ed. 1947, p. 221; *Culkin v. McFie & Sons, Ltd.*, [1939] 3 All E.R. 613 at 619. Allurement is simply the bait to the trap, and obviously what will constitute an allurement and a trap to a child is not necessarily so to an adult: *Robert Addie and Sons (Collieries), Limited v. Dumbreck*, *supra*; *Schoeni et al v. King et al.*, [1944] O.R. 38, [1944] 1 D.L.R. 326; *Williams v. Cardiff Corporation*, [1950] 1 K.B. 514, [1950] 1 All E.R. 250; *Cuttress et al. v. Scaffolding (Great Britain) Ltd. et al.*, [1953] 1 All E.R. 165; *Glasgow Corporation v. Taylor*, [1922] 1 A.C. 44.

The evidence of the death of another tenant as a result of falling through this same window was properly admissible as showing that there was a trap: *Denny v. The Montreal Telegraph Company* (1878), 42 U.C.Q.B. 577 at 581, affirmed 3 O.A.R. 628.

The cases referred to for the appellant as to trespassers all deal with adults.

*F. J. Hughes, Q.C.*, did not reply.

*Cur. adv. vult.*

22nd April 1953. PICKUP C.J.O.:—This is an appeal by the defendant, the Corporation of the City of Ottawa, from the judgment of Spence J., dated 21st April 1952, in an action tried with a jury at Ottawa.

The plaintiffs are an infant, who sues by his next friend, and his father. The action was brought for damages resulting from personal injuries received by the infant plaintiff when he

fell to the ground through a window on the third floor of a building situate on Rideau Street in Ottawa, known as "Wallis House".

The property in question was being used by the appellant as a temporary emergency shelter. By a lease dated 1st April 1948 the appellant demised to one Carolina Dorion three rooms in Wallis House, known as suite no. 29. This was a lease from week to week. The lessee was the grandmother of the infant plaintiff, and occupied the demised premises with her daughter, her son-in-law (the plaintiff Bernard Munroe), and her grandson (the infant plaintiff). Part of the premises known as Wallis House consisted of a wash-basin room, in which were installed a number of wash-basins, but this room was not part of the demised premises. The superintendent or janitor of the building, however, allotted to the tenant one of the basins in this wash-basin room. It was argued on behalf of the appellant that this permission to use a part of the wash-basin room should be confined to the tenant and members of her family, treating the son-in-law, daughter and grandson as boarders or lodgers. Reliance is placed by the appellant upon a provision in the rules and regulations which formed a part of the lease, one of which regulations prohibited the lessee from keeping boarders, roomers or lodgers without the written consent of the lessor. I think that upon the evidence this allocation of a wash-basin in the wash-basin room should be considered as being permission to use the wash-basin, and for that purpose to enter the wash-basin room, and that such permission should include, not only the lessee, but also her daughter, her son-in-law and the infant plaintiff.

The jury made the following findings in answer to questions put to them:

"Q. 1. Was the infant plaintiff on the defendant's premises at Wallis House to the knowledge and with the permission of the defendant? Answer 'Yes' or 'No'.

"The answer is 'Yes'.

"Q. 2. How were the injuries to the infant plaintiff caused?

"A. By a fall through the window-pane shown broken in Exhibit No. 6.

"Q. 3. Was there present in the washroom a hidden danger, an allurement or enticement to the infant plaintiff? Answer 'Yes' or 'No'.

"The answer is 'Yes'.

"Q. 4. If your answer to Question No. 3 is 'Yes', describe its nature.

"A. A combination of a heating radiator, pipes, basin, bracket and platform adjacent to an unprotected window.

"Q. 5. If your answer to Question No. 3 is 'Yes', did the defendant through its officials know of the danger which existed? Answer 'Yes' or 'No'.

"The answer is 'Yes'.

"Q. 6. If your answer to Question No. 5 is 'Yes', did the defendant use reasonable care to prevent injury from the hidden danger, allurement or enticement to the infant plaintiff? Answer 'Yes' or 'No'.

"The answer is 'No'.

"Q. 7. If your answer to Question No. 6 is 'No', state in detail the manner in which the defendant failed to use such reasonable care.

"The answer is: 'failure to install protective guards on the washroom windows'."

Counsel for the appellant contends that on the facts of this case the infant plaintiff was a trespasser in the wash-basin room, or that if there was any permission of the appellant for the infant plaintiff to be in the wash-basin room at all, it was a permission limited to being there for the purpose of using the wash-basin only, and only if accompanied by an adult. At the time of the accident the infant plaintiff was about 4½ years of age. I think the finding of the jury that the infant plaintiff was on the appellant's premises to the knowledge of and with the permission of the appellant must be taken to mean a permission to be in the wash-basin room, and the main question to be determined in this appeal is whether the evidence justified such a finding by the jury.

I do not think there was any evidence that would justify a finding of the jury that the infant plaintiff was in the wash-basin room to the knowledge of the appellant, and if this permission were to turn upon knowledge of the appellant that the infant plaintiff was, on the occasion in question or on any other occasion, in the wash-basin room, there would be no justification for holding that there was such permission. As I have above indicated, however, I think the permission for the infant plaintiff, as a member of the household of the tenant, to be in the wash-basin room for the purpose of using the room as such



should be inferred from the lease and from the fact of the allotment to the tenant of a wash-basin in the wash-basin room.

The appellant contends, however, that there was no hidden danger in the wash-basin room. There was, as the jury have found, a combination of a heating radiator, pipes, basin, bracket and platform adjacent to an unprotected window. To a child on the platform there would be no protection from falling out of the window, except the window-pane. That this was a hidden danger to a child 4½ years of age can hardly be questioned. There would be no danger that would be hidden to an adult—any adult would know what danger there was and could guard against it. The combination, referred to by the jury, in their answer to question 4, was found by the jury to be an allurement or enticement to children. That finding is, I think, fully supported by the evidence.

It is not clear, upon the evidence, just how the infant plaintiff happened to fall out of the window. There is the evidence of the mother of the infant plaintiff that she was using the laundry room at the other end of the hall and that the infant plaintiff asked her if he might go into the wash-basin room. She gave her permission, adding that from where she was she could see into the wash-basin room. The evidence also shows that the infant plaintiff and another child were seen upon this platform a few minutes before the accident occurred. I think that it is a reasonable inference from the evidence that the infant plaintiff fell from a position on this platform against and through the window-pane adjacent.

Counsel for the appellant contends that even if there was permission of the appellant for the infant plaintiff to be in the wash-basin room, there was no permission to play there, or to be there at all unaccompanied by an adult person. The premises were not dangerous to an adult, or to a child, too young to appreciate danger, if accompanied by an adult.

I shall first deal with the contention of the appellant that any permission to be in the wash-basin room at all should be limited to a permission to be there only if accompanied by an adult, and that if the infant plaintiff had been so accompanied there would have been no accident. Can the permission be so limited on the facts of this case? I have considered the cases cited by counsel for the appellant and have reached the conclusion that it cannot.

I think I should refer particularly to some of the decided cases relied upon by the appellant.

In *Pianosi et al. v. Canadian National Railway Company*, [1943] O.W.N. 766, [1944] 1 D.L.R. 161, 56 C.R.T.C. 218, it was said by Robertson C.J.O. (citing Salmond on Torts, 9th ed. 1936, p. 537, and *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398) that a licence of a general character did not necessarily extend to children too young to take care of themselves. That was a case of permission to the public to use a well-marked foot-path leading to and across railway tracks. The alleged permission, if it existed at all, had to be established by practice or custom to the knowledge of the railway company. On the facts of that case it might well be said that the permission should not be extended to children too young to appreciate danger or take care of themselves when not accompanied by an adult person.

In the *Latham* case, *supra*, it was said by Hamilton L.J. at p. 144 (citing *Burchell v. Hickisson* (1880), 50 L.J.C.P. 101) that: "... the circumstances may evidence the attachment of a condition to a licence or permission to enter, namely, that the child shall only enter if accompanied by a person in charge capable of seeing and avoiding obvious perils and thus of placing both himself and his charge in the position of an ordinary licensee both able and bound to look after himself." I do not think there are any circumstances in the instant case which would justify attaching to the permission to use the wash-basin room a condition that the infant plaintiff would have to be accompanied by an adult.

Dealing next with the contention of the appellant that there was no permission for the infant plaintiff to be playing in the wash-basin room, and that he was a trespasser if he went there to play, I do not think this contention can prevail. If the infant plaintiff was in the wash-basin room with the permission of the appellant, he was in the presence of what the jury have found to be an allurement or enticement to children, and that allurement or enticement was created by the appellant. This is not a case of the child being in a different locality from that embraced in the licence or permission, nor is it the case of one straying beyond the limits of the place to which the permission relates. The presence of the allurement or enticement is, I think, a complete answer to this contention of the appellant,

if the infant plaintiff was in the wash-basin room with the permission of the appellant. The mere fact that the infant plaintiff was doing something at the time that he had no right to do would not make him a trespasser, if he had permission to be where he was when attracted by the allurements or enticement.

I think the principle to be applied in this case is the principle laid down by Lord Atkinson in *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229, which was approved by Hamilton L.J. (later Lord Sumner) in the *Latham* case, *supra*, at p. 416, and later applied by Lord Buckmaster in *Glasgow Corporation v. Taylor*, [1922] 1 A.C. 45 at 50. This principle as quoted by Lord Buckmaster is:

“The presence in a frequented place of some object of attraction, tempting ‘a child’ to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence, it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness of the peril of the object.”

In the *City of Glasgow* case the death of the child was the result of eating berries which the child had no right to eat, but he was not considered to be a trespasser in so doing, the situation being such that children would be tempted and deceived by the appearance of the shrub and would eat the berries.

In any event, in the instant case there is no evidence as to what was the purpose of the infant plaintiff in going into the wash-basin room. He may have gone there to wash and, while there, proceeded to play. It would be natural for a child such as the infant plaintiff to endeavour to climb upon what the jury have found to be an enticement or allurements and a trap.

The result is that I think the jury were justified, on the evidence, in finding, as I take their finding to mean, that the infant plaintiff was, on the occasion in question, in the wash-basin room with the permission of the appellant; that there was present in the wash-basin room a hidden danger, an allurements or enticement to the infant plaintiff; that the danger was known to the appellant; that there was a breach of duty on the part of the appellant in failing to install protective guards on the window, and that this breach of duty was the cause of the injury to the infant plaintiff. Upon these findings the plaintiffs were entitled to judgment.



A further contention raised on behalf of the appellant was the alleged wrongful admission of evidence as to a previous injury to an elderly woman who fell out of the same window or, as counsel for the appellant put it, that within this trial there was another trial as to the accident to this elderly woman, and that that would prejudice the jury. I think that the evidence as to the happening of the previous accident was relevant in this case to show knowledge on the part of the appellant that there was some danger in having an unprotected window extend as near to the floor as this window did. It is true that it was not because this window extended so near to the floor that this accident happened, but knowledge of that danger should suggest to the appellant the danger of someone falling out of the same window from the position from which the infant plaintiff appears to have fallen. In any event the danger was apparent to anyone except a person incapable of appreciating danger. It may be that more evidence was given about the previous accident than was necessary, but I do not think that it can be said that any substantial wrong or miscarriage of justice was occasioned thereby.

I would dismiss the appeal with costs.

HOGG J.A. (*dissenting in part*):—The opening words of a judgment delivered in the House of Lords over a century ago by Lord Brougham are: "It is my misfortune to have formed a different opinion from that of my noble and learned friend; and I must now state to your Lordships the grounds of the judgment which I am compelled to give in opposition to his." I find that it is my misfortune in the present appeal to have formed a different opinion from that of my Lord the Chief Justice on one branch of the case, and I now desire to set forth the grounds upon which my opinion is based.

It was said by Hamilton L.J. in *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398—a case to which further reference will be made—that "Children's cases are always troublesome". I agree with him and may say that I have had some difficulty, because of the facts and the law which seems to me to be applicable to these facts, in endeavouring to set out adequately the grounds for the conclusion I have reached. It is necessary to outline again only a portion of the evidence.

The circumstance that the infant respondent was only 4½ years of age when he was injured is of importance.

Whether a person is a licensee or a trespasser is a question of fact to be decided by the jury. The jury found, when the answers to the questions put to them by the learned trial judge are read as a whole, that the infant respondent had permission from the appellant corporation to be in the washroom from a window of which he fell and suffered grievous injury.

There are many grounds of complaint set out in the notice of appeal, but in my opinion there are only two that are material. The first is that the learned trial judge did not direct or instruct the jury upon the circumstances which must be considered and the law which should be applied, in determining whether the appellant had granted permission, and therefore a licence, to the infant respondent to go into the room where danger existed so far as he was concerned. The further ground of complaint is that the trial judge did not direct or instruct the jury upon the question of the care required to be taken of the infant respondent by his parents, and did not explain to the jury the law relating to the obligation on the parents of a young child to protect him from danger known to his parents.

These material issues raised in appeal are set out in the notice of appeal in the following words: "that the learned Trial Judge failed to charge the jury on the question of supervision required by the parents of the infant Plaintiff and that the license of the infant Plaintiff, if any, was conditional upon such proper supervision."

Evidence material to these issues was given by Balmore Lemire, the janitor of the building. This witness said that he knew that children played, on occasion, in the washroom from a window of which the infant respondent fell, and he had seen them on the shelf or platform which had been constructed on top of the wash-basins in this room adjacent to the said window and which the jury considered to be involved in the hidden danger and allurements they found were caused by the basins, pipes and other fixtures in the washroom. Lemire had ordered the children, including the infant respondent, to get off this shelf and had told them not to get on to it again. There is no evidence that he forbade the children to go into this washroom alone or that he ordered them out of it when he found them there,

although he said he considered it to be a place of danger to them.

The respondent Bernard Munroe, the father of the child Danny who was injured, said that he knew the washroom was a dangerous place for young children. He knew that children played in this room and had seen them on the shelf constructed over the wash-basins. Munroe had asked the children not to climb on to this shelf. He said it was his wife's habit to take her children to this room to wash them.

Mrs. Munroe, the mother of the child, said that shortly before the accident she was working in a room across a hall from the washroom in question and Danny, who was with two other young children, was given permission by her to go into the washroom in which the accident happened. She said she could see him there through the crack at the back of the door but she did not see him fall through the window. Mrs. Munroe further said that she and her husband had forbidden the child to go into the washroom by himself.

It is necessary to bear in mind these portions of the evidence in considering the grounds of appeal to which I have made reference.

The questions which this Court is called upon to resolve, in so far as I see the matter, may be stated as follows: (1) Should the jury have been directed by the trial judge as to the circumstances which are to be considered and the law which is to be applied with reference to the extent of the permission and of the licence founded thereon, to be imputed to young children to enter on or into a place of danger to such children unaccompanied by a person of more mature understanding when such danger is known to the parents of such children? (2) Should the jury have been directed as to the law dealing with the obligation upon the parents of young children to protect them from a danger which is known to such parents? (3) If the jury was not so directed, does such non-direction warrant this Court granting a new trial?

The law relating to the obligations imposed upon the owners of property and upon the parents of young children when their children are injured on such property has been discussed by the Courts in a number of cases. The decision cited, perhaps, more often than others, is that of the House of Lords in *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229.



There a young child was injured while playing on a turntable on the property of the railway company and it was known to the servants of the company that children were in the habit of playing on this turntable. The Court held that there was evidence of negligence on the part of the railway because the habitual acquiescence of the company was evidence that the child was not a trespasser but was on the railway company's premises as a licensee.

It is observed in *Salmond on Torts*, 10th ed. 1945, p. 499, note *h*, that: "... a mere general license or invitation, such as may be inferred from habitual acquiescence, is not necessarily to be construed as extending to children so young that they ought not to be at large without proper guardianship."

Mere tolerance alone is not enough to show acquiescence. In *Robert Addie and Sons (Collieries), Limited v. Dumbreck*, [1929] A.C. 358, in the House of Lords, Viscount Dunedin said at p. 373, referring to the question whether permission had been granted by the owner of lands to a child who had been injured, to be on the land where the accident happened: "... but it is permission that must be proved, not tolerance, though tolerance in some circumstances may be so pronounced as to lead to a conclusion that it was really tantamount to permission . . ."

Scrutton L.J. said in *Liddle v. Yorkshire (North Riding) County Council*, [1934] 2 K.B. 101 at 112, in speaking of the liability of an owner to children injured upon his land, that "the invitation" to the child to be upon the land "might be implied from knowledge that children frequented the land without interference". I think that the word "invitation" must be held to mean also "licence".

The question of tolerance and acquiescence are matters for the jury to consider, after direction upon the law, in deciding whether the infant respondent was a licensee.

The element of guardianship as it affects the extent of the permission, and therefore the extent of the licence found in such permission, to a child who is too young to understand danger that might confront him, to go upon property or premises where such danger may be present, and also as it affects the rights and obligations of the parents of such child, was not the subject of comment to the jury by the learned trial judge.

In *Latham v. R. Johnson & Nephew, Limited*, *supra*, a young child was injured while playing upon a heap of stones on the

property of the defendant. The jury found that there was no invitation to the child to use the land, unaccompanied, but also found that the defendants had been negligent.

On appeal Farwell L.J. said at p. 407: "I am not aware of any case that imposes any greater liability on the owner towards children than towards adults: the exceptions apply to all alike and the adult is as much entitled to protection as a child. If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian."

Hamilton L.J. said, at p. 414: "The child must take the place as he finds it and take care of himself; but how can he take care of himself? If his injury is not to go without legal remedy altogether by reason of his failure to use a diligence which he could not possibly have possessed, the owner of the close might be practically bound to see that the wandering child is as safe as in a nursery. The way out of the dilemma was found in *Burchell v. Hickisson*, 50 L.J.C.P. 101, by deciding that the circumstance may evidence the attachment of a condition to the licence or permission to enter, namely, that the child shall only enter if accompanied by a person in charge capable of seeing and avoiding obvious perils and thus of placing both himself and his charge in the position of an ordinary licensee both able and bound to look after himself."

In our own Court in *Pianosi et al. v. Canadian National Railway Company*, [1943] O.W.N. 766, [1944] 1 D.L.R. 161, 56 C.R.T.C. 218, Robertson C.J.O. expressed the opinion that a licence of a general character did not necessarily extend to children too young to take care of themselves.

A further case often cited is *Schofield v. Mayor, etc., of Bolton* (1910), 26 T.L.R. 230. A child playing in a field had wandered on to a railway line and been injured. The jury found that the defendant had been negligent in leaving certain gates open. Vaughan Williams L.J. said, at p. 231: "This child was only one year and nine months old, and any person of common-sense must have known that it was wrong to let such a child go into the field alone. The real *causa causans* of the accident was the gross neglect of the father and mother, and the appeal must be allowed."

In *Coates et al. v. Rawtenstall Borough Council*, [1937] 3 All E.R. 602, the plaintiff, a child slightly over 3 years of age, was injured while sliding down a chute on the defendant's

premises. At the time of the accident he was accompanied by an intelligent boy of 14. It was held that the plaintiff was accompanied by a competent guardian, and was therefore a licensee. It was also held that the injuries were caused by a danger which was known to the defendant council.

Lord Justice Slesser quoted the passage which I have quoted from the judgment of Farwell L.J. in the *Latham* case that if a child is too young to understand danger he should not be considered a licensee unless accompanied by a guardian, and said at p. 607: "Now, in this case, the child was accompanied by a competent guardian: he was in the care, as is stated in the judge's judgment, of his cousin, Rex Booth, a very intelligent boy of fourteen years of age. I see no reason to form the conclusion that this very intelligent boy of fourteen was not, for the purpose of mounting and descending this chute, a competent guardian."

In *Jenkins v. Great Western Railway*, [1912] 1 K.B. 525, Lord Justice Farwell expressed the opinion that when the invitation or leave and licence depended, not on actual but on imputed knowledge, it must be limited by the knowledge that was proved to exist in the owner of the land where the accident happened, and he doubted whether such invitation extended to a child 2½ years of age so as to relieve the parents of all responsibility for allowing a child to go on the land where he was injured.

In our own Courts the question of the obligation of the parents of a young child who was drowned after going on a trestle owned by the defendant company was considered by Mr. Justice Middleton in *Pedlar v. Toronto Power Co.* (1913), 29 O.L.R. 527, 15 D.L.R. 684, affirmed 30 O.L.R. 581, 19 D.L.R. 441. He said at p. 533: "I think that the parents' right to recover is barred by their contributory negligence, as they admittedly knew of the peril to their children, and ought not to have allowed this child to be at large without some kind of supervision."

I am of the opinion that the law discussed and set forth in the cases I have mentioned is applicable to the circumstances of the present case, in determining whether it can be inferred that the infant respondent had permission to enter, unaccompanied by some person of more mature understanding, into the washroom where danger to the child was known to exist. This



proposition of law should have been brought to the attention of the jury and explained to them by the learned trial judge.

However, with some hesitation, I have concluded that, because of the circumstances of this case, the lack of such instruction to the jury is not vital in its consequences. Although the jury were not directed on this point, and although no express permission had been granted to the child to go into the washroom unaccompanied by an older person, there is the evidence to which I have alluded from which it could be inferred by the jury that the infant respondent had a licence to go into this room. Upon the testimony of the janitor Lemire, the jury were entitled to find that degree of tolerance and habitual acquiescence by him towards children, including Danny Munroe, being in the washroom unaccompanied by a parent or some other person of understanding, as would be tantamount to permission. It will be recalled that although Lemire ordered the children to get off, and stay off, the shelf, he apparently allowed them without hindrance to play in this room which contained those things that the jury found to be an allurements and a hidden danger.

Evidence showing what authority Lemire had to bind the appellant corporation by his words or conduct, so as to impute a grant by the corporation of the permission in question, is scant, but I think the fact that he occupied the position of janitor of the building in which the respondents lived is evidence from which such authority can be inferred. It is the occupier or some servant in a position of authority on the premises who must acquiesce in the user of the land: *Riopelle v. Desjardins et al.*, [1950] O.R. 93.

In view of what I have stated, I must conclude that a new trial cannot be granted on this branch of the case, on the ground of non-direction amounting to misdirection of such character as to result in a substantial wrong or miscarriage of justice.

There is an additional reason which restrains the Court from granting a new trial, to be found in the fact that no objection was taken at the trial to the absence of direction to the jury on the extent of the permission that may be inferred according to the circumstances and on the law pertaining to this subject. This point was first raised in the notice of appeal to this Court.

Although there is no absolute rule that prohibits an appellate Court from entertaining argument upon a matter not raised at the trial, there are several decisions of our own Court, of the Supreme Court of Canada and of the House of Lords which hold

that in most cases a new trial will not be granted where objection has not been taken in the Court of first instance. The judgments in *Adams v. Windsor Truck and Storage Co.* (1920), 48 O.L.R. 446, 57 D.L.R. 317; *Wilson et al. v. United Counties Bank, Limited*, [1920] A.C. 102, and *Thompson v. Fraser Companies, Limited*, [1930] S.C.R. 109, [1929] 3 D.L.R. 778, are in point.

Turning now to the second branch of the appeal, which is concerned with the judgment in favour of the adult respondent Bernard Munroe for damages to the amount of \$1,040.50, I think—and I express my opinion with great respect for the learned trial judge—that the attention of the jury should have been directed to the evidence which dealt with the question of the care taken by the boy's parents to protect him from a danger known to themselves, and the law stated in the cases I have mentioned, relating to the obligation cast upon the parents of small children to protect them from a danger known to such parents, should have been clearly explained to the jury. Also, a question or questions should have been put to the jury directed to the subject of negligence on the part of the adult respondent. It is, perhaps, needless to observe that the possible effect of The Negligence Act, R.S.O. 1950, c. 252, upon the claim for damages of the adult respondent was not the subject of comment.

Viscount Hailsham L.C. says in *Swadling v. Cooper*, [1931] A.C. 1, that it is essential that the law should be correctly and fully stated to the jury and that it is of hardly less importance that it should be stated in simple and plain terms.

Non-direction of the jury may amount to misdirection according to the circumstances of each case. In *The Prudential Assurance Company v. Edmonds* (1877), 2 App. Cas. 487, Lord Blackburn, one of the outstanding judges of his time, gave a lucid explanation of the rule of law on this particular subject. He said at p. 507: "I take it that when there is a case tried before a Judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the Judge is to give a direction upon the law to the jury, so far as is necessary to make them understand the law as bearing upon the facts before them. Farther than that, it is not necessary for him to go . . . So far as a statement of the law is necessary to give a proper guide to the jury upon the case, the Judge should state it; and although it is generally said, and said truly, that non-direction is not a subject of a bill of exceptions, yet when the facts are such that in order to guide the jury properly there should be a direction of law given, the not giving that direction of law would be a

subject for a bill of exceptions and would be a ground for a *venire de novo*."

In *Hall et al. v. The Toronto Guelph Express Company et al.*, [1929] S.C.R. 92, [1929] 1 D.L.R. 375, 63 O.L.R. at 364, it was held that the trial judge misdirected the jury as to the scope and effect of a statute and that their findings were thereby affected to such an extent that they could not stand. This judgment of the Supreme Court of Canada is, I think, in point, for in my opinion the non-direction of the jury on the question of the care required of parents towards young children affected the finding of the jury on the matter of awarding damages to the adult respondent.

After the learned trial judge had charged the jury and before they had brought in their verdict, counsel for the appellant asked that they be recalled and be requested to answer a question whether the respondent Munroe and his wife had taken reasonable care of the child in the circumstances. This request was not complied with and this question was not put to the jury.

I have concluded that the non-direction of the jury upon the point which is now under consideration amounted to a misdirection which resulted in a substantial wrong being occasioned. The appellant corporation was entitled to a finding upon this question, such finding being arrived at under a proper direction.

Because I hold that a new trial should be granted, directed to the question of negligence on the part of the adult respondent Munroe, I have endeavoured to discuss the facts only so far as was necessary to give a reason for my decision, and to refrain from giving my opinion upon the facts that will be involved in a new trial.

The appeal should be dismissed with costs in so far as the judgment in favour of the infant respondent is concerned, but should be allowed with costs as to the judgment in favour of Bernard Munroe, and that part of the judgment awarding damages to him should be set aside, the costs of the former trial in this connection to be disposed of by the judge presiding at the new trial.

AYLESWORTH J.A. agrees with PICKUP C.J.O.

*Appeal dismissed with costs, HOGG J.A. dissenting in part.*

*Solicitors for the plaintiffs, respondents: Hughes and Laishley, Ottawa.*

*Solicitor for the defendant, appellant: Gordon C. Medcalf, Ottawa.*



[McRUER C.J.H.C.]

**Frampton v. Frampton and Whiteman.**

*Divorce—Bars to Relief—Collusion—What Constitutes—Wife Induced to Sue for Divorce by Husband's Agreement as to Financial Terms.*

When an action for divorce is brought by a wife, not because she sincerely desires a divorce, but because she wishes to get the maximum financial allowance from her husband as the price of the divorce, and knows that he, being infatuated with another woman, and in order that he may be in a position to marry her, is willing to do much more by way of financial arrangement than he would do in a simple action for alimony, the claim for divorce will be dismissed as collusive.

When a divorce action has been commenced in collusion, and things are done in the course of the action that amount in law to collusion, and the plaintiff in her evidence says that she does not really want a divorce, the Court is put on strict inquiry whether it should be used to assist parties to get satisfactory financial arrangements by giving or withholding a divorce, or by refusing to give the divorce until the arrangements become satisfactory.

*Scott v. Scott and Pfeil*, [1946] O.R. 832, affirmed [1947] O.W.N. 188; *McLean v. McLean and McLellan*, [1948] O.R. 691; *Hodgins v. Hodgins*, [1942] O.R. 440; *French v. French and Green*, [1947] O.R. 668, discussed.

In an action for divorce it is most important that there should be disclosed to the Court all previous agreements as well as details of all negotiations that have taken place between the parties.

TWO ACTIONS by a wife, one for dissolution of marriage and one for alimony.

16th to 19th March 1953. The actions were tried together by McRUER C.J.H.C. without a jury at Toronto.

*Lewis Duncan, Q.C.*, for the plaintiff.

*S. J. Kelner*, for the defendants.

19th March 1953. McRUER C.J.H.C. (orally):—Dealing first with the claim for dissolution of marriage: This action is founded on allegations of adultery of the male defendant with the female defendant at the Laurentian Hotel in the city of Montreal from the 5th to the 9th November 1948, and that from about the month of July 1949 the defendants have lived together as man and wife, first at a home known as Louth Haven on the Lake Shore Road in the vicinity of St. Catharines, and later at 314 Rosemary Road in the city of Toronto.

The litigation between these parties has been extensive and has taken some unusual and different courses. An action was brought on the 30th July 1949 by Mrs. Frampton against Mr. Frampton for alimony on the ground of desertion and cruelty. A statement of defence was delivered in that action and it was set down for trial on the 26th October 1949. On the 30th September 1950 Mr. and Mrs. Frampton entered into a signed agree-

ment which recited that an action had been commenced in the Supreme Court of Ontario in which the wife was the plaintiff and the husband was one of the defendants, and in which the wife was claiming divorce, alimony or maintenance, and other relief. In this agreement the husband agreed to pay \$250 per month, subject to increase or decrease depending upon the future increase or decrease of the husband's income, and to transfer to his wife his interest in 63 Fleming Crescent and some benefits under an insurance policy. This agreement appears quite ordinary and regular on its face. However, two letters from the husband's solicitor to the solicitor then acting for the plaintiff have been filed, which bear on this agreement. The first is dated 23rd June 1950, and the second 18th August 1950.

The first letter acknowledges a letter of 22nd June, "with further draft Agreement enclosed therewith", and states satisfaction with the agreement, but it contains this paragraph:

"There shall be incorporated in our private Agreement, the further understanding that unless Judgment Absolute is granted within 18 months after July 1, 1950, then the clause relating to the house on Fleming Crescent, going to the wife, shall be void and of no effect, and the Deed shall be delivered back to Mr. Frampton and they shall be mutually responsible for the maintenance of the house and so on, after the said 18 months' period, all provided of course, there is no Judgment Absolute."

The second letter reads as follows:

"It seems now that we can finally be on our way with the Divorce Action and the Agreement since I have just spoken to Mr. Frampton and he is willing to have the payments of \$250.00 commence on the first of the month next after the signing of the Agreement, provided the Writ is issued at the same time as the Agreement and I am sure that this can be done so that the difference between saying that the payments commence after the signing of the agreement or the commencement of the Action is really academic. He will deposit \$300.00 forthwith in my Trust Account as payment of the Action, as agreed.

"We will of course have the Alimony Action dismissed without cost forthwith after the issuance of the divorce Writ. Mr. Frampton is agreeable to the Power of Attorney with regard to his Income Tax Assessment, etc. He would like his wife to go to the Bank right away and return the War Savings Certificates . . . ."

Following the agreement of the 30th September 1950 the action for alimony was discontinued by notice of discontinuance dated the same day the writ for divorce was issued without any claim for alimony or maintenance.

Mr. Frampton stated in the witness-box that as he understood the matter, if the divorce did not proceed and judgment absolute was not granted, he was to receive back—or, at any rate, the conveyance of his half-interest in the house on Fleming Crescent which had been the family home was not to be effective.

When one analyzes that it is simply this, that Mr. Frampton was buying a divorce from his wife at a price. Added to that is the plaintiff's statement in the witness-box in her examination in chief that she did not want a divorce, that she did not believe in divorce, but what she wanted was security. While the divorce proceedings were pending she wrote two letters to her husband, one dated 11th October 1951 and the other dated 3rd November 1951.

In the letter of 11th October she said: "I am writing asking you to let us live together as man and wife as we promised in our marriage vows. Do not worry about what people would say. I do know that many of our friends would be pleased about it. Arthur we should do this for our own sakes and for the sake of the children and grandchildren. Either you come back here or for me to go to you. We could all get back into church work again. You know Arthur I never wanted you to go away and stay away from me. I have always loved you and I do still. You are the only man in my life. I need your help and support. And I want you to come back to me, or let me go to you. If we can only be united the litigation could stop. We could have such a happy time, with the children and grandchildren. I hope there will be ten as I hoped for ourselves. I will close with lots of love hoping to hear from you. I will always love you."

And on 3rd November she wrote:

"Dear Arthur:

"I wrote you on Oct. 11th but I have not heard from you. I hope you will write me.

"On Thursday an invitation addressed to Mr. and Mrs. A. H. Frampton came by mail, it was an invitation from Mr. & Mrs.



James E. Hahn to an at home on Friday 9th November from 5—7 p.m. at 'Woodlands' Park Lane Bayview.

"Please let me know what I should do.

"Your loving wife as ever

"Retta."

These letters were registered, and it may be that they were prepared to put on record the sentiments of the plaintiff towards her husband, or it may be that they were written for an ulterior purpose. They do not read to me like letters that were written for an ulterior purpose. I saw the plaintiff in the witness-box and she did not impress me as the sort of person who could write letters of that kind if she did not mean them. In fact, her general demeanour in the witness-box was that she was against the whole divorce proceeding, but she felt that in order to get the security that was being held out to her it was a necessary element.

The plaintiff eventually changed solicitors and negotiations were again entered into. On 31st May 1951 an action was commenced by the plaintiff's present solicitors claiming alimony. On the 21st September certain amendments were made to the statement of claim. One of those was an allegation that the defendant cohabited with Mrs. Whiteman as man and wife. There is a claim to set aside the agreement of the 30th September 1950, and reference is made in the statement of claim to the pending action for divorce.

Negotiations were carried on between the solicitors again with reference to the claim for alimony, but these negotiations, to my mind, went beyond negotiations for the settlement of the monetary claim for alimony. A written agreement dated the 23rd May 1952 was signed by the plaintiff and submitted to the defendant, but the defendant refused to sign it because provision for the dismissal of another action that had been brought against Mrs. Whiteman for alienation of Mr. Frampton's affections and for criminal conversation had not been made.

This agreement provides that the husband will consent to an order setting aside the separation agreement without admitting the validity of any of the allegations contained in the statement of claim. It goes on to provide that: "Both parties shall deliver to their respective solicitors all copies of the said Separation Agreement, and all letters and papers signed by the husband or wife in respect of any matter or thing between the

husband and wife, or relating to any proceedings between the husband and wife; and the said solicitors shall in the presence of each other destroy all copies of the said agreement and all such letters and papers."

I point out that this was while the action for divorce was pending, and I emphasize the importance, in an action for divorce, of having before the Court all previous agreements as well as all previous negotiations that have taken place—the Rules require it and good conscience demands it. Nevertheless, this proposed agreement, which was agreeable to both parties with the exception I have mentioned, provided that these documents should be destroyed, and among the letters that were to be destroyed was one referring to the private agreement. It may be that it was the intention of the parties that these documents were to be submitted to the Court before they were destroyed, but the agreement did not so state.

The agreement provided further that the husband would deliver a conveyance in satisfactory form of his interest in 63 Fleming Crescent, and that the husband would pay the taxes on 63 Fleming Crescent, and would pay the principal and interest on the mortgage on that property, and that he would pay to the wife the sum of \$70, and then there are these provisions:

"The husband will deliver to the solicitors for the wife two marked cheques payable to the wife for \$1,000 and \$1,500 respectively. The said cheques shall be held in escrow by the said solicitors and are to be released on the following dates:

"(i) as to the cheque for \$1,000, on the day on which Judgment Nisi for divorce is pronounced in the said divorce action;

"(ii) as to the cheque for \$1,500, on the day on which Judgment Absolute is pronounced in the said action.

"(9) The wife will bring the divorce action on for trial so soon as may be; and if a Decree Nisi be pronounced, she will, as soon as may be, make application to have the decree made absolute; provided that should the action for divorce be dismissed or not result in judgment absolute both parties hereto will consent to judgment being entered in the alimony action on the ground of the desertion of the wife by the husband for permanent alimony for the wife of \$300 per month together with interim alimony to the date of the final judgment in the alimony action at the rate of \$250 per month from the date of the dis-

missal of the divorce action or of the refusal of judgment absolute as the case may be.

“(10) When Judgment Absolute comes to be pronounced the husband will cause to be paid in monthly instalments of \$50.00 each to Retta Victoria Frampton, such sum of money as will represent a total of \$100 per month from the 1st day of June 1951, to the date of the Decree Nisi; and the husband will give to the wife, as evidence of his obligation to pay the said sum an appropriate number of promissory notes signed by him, payable at monthly intervals commencing one month after the date of Judgment Absolute; which said notes shall bear interest at 5% per annum from the date of Judgment Absolute until they become due.”

For my purpose at this stage I think it unnecessary to refer to any further provisions of this agreement. Taking this agreement together with the earlier agreement and the letter of the solicitor that accompanied the earlier agreement, it is perfectly obvious to me, and I so find as a fact, that the divorce action in this case was being made the subject of negotiations for the financial benefit of the plaintiff, apart from what legal rights she might have to alimony, and that what was really taking place in fact was that the Court was being made a market-place for the sale of a divorce at an agreed consideration.

It is argued, notwithstanding that the plaintiff stated in chief that she did not want a divorce, that after she heard all the evidence, including her husband's statements in the witness-box about his relations with Mrs. Whiteman, and heard him say that Mrs. Whiteman had wanted a divorce from her husband because her husband had infected her with venereal disease, the plaintiff then, in the light of that, in a feeble way rather retracted what she had said with reference to not wanting a divorce.

I may say there is no evidence whatever that Mrs. Whiteman was at any time ever infected with venereal disease. Mr. Frampton was not, in my view, a reliable witness. There were many instances where his evidence was tested in cross-examination and found to be quite unreliable, particularly with reference to a woman by the name of Jane Forsythe. His explanations about this woman at first led one to believe that she was almost a stranger to him. Then letters were filed from the woman addressed to him that were most effusive in their endearing terms



and indicated that he was having, or about to have, associations with her that were quite beyond his marriage vows. I do not believe him in his denial of his relationship with this woman—and I find little of his evidence that I can believe, because of his proclivity for telling a plausible story which, when it is tested by something that is really authentic, falls to pieces or is re-arranged.

I think he went to Montreal in the first instance to provide grounds for divorce both for Mrs. Frampton and for Mr. Whiteman. Mrs. Whiteman was in due course divorced. Mrs. Frampton did not take any action. Then I think she took the action that she took in this case when she was being pressed financially, and that it was due to the pressure that was being put on her by a man who could maintain her in very satisfactory circumstances that the divorce action was taken in the way in which it was taken, and all the evidence confirms me in my conclusion that it is a collusive action.

When an action has been commenced in collusion, when things have been done during the course of the action that amount in law to collusion, when the plaintiff in her evidence in chief says she does not want a divorce, and then in a feeble manner, as I have said, in reply rather withdraws that to some extent, the Court is put on strict inquiry as to whether the good offices of the administration of justice should be used to assist parties to get financial arrangements by giving or withholding a divorce, or withholding a divorce until the arrangements have become satisfactory and then giving a divorce.

I dealt with this subject in *Scott v. Scott and Pfeil*, [1946] O.R. 832, [1947] 1 D.L.R. 374. That case was affirmed in the Court of Appeal, [1947] O.W.N. 188, [1947] 1 D.L.R. 918. I dealt with it again in *McLean v. McLean and McLellan*, [1948] O.R. 691, [1948] 4 D.L.R. 232. In *Scott v. Scott and Pfeil* I quoted from the judgment of Mr. Justice McTague in *Hodgins v. Hodgins*, [1941] O.R. 440, [1942] 3 D.L.R. 494, where he said:

“It must be remembered that the Court has rights and that in every divorce case there is involved a public interest going to the very basis of national life. In the public interest the Court has not only a right but a duty to erect reasonable safeguards and impose its own discipline.”

That case was referred to with approval by Mr. Justice Hogg in *French v. French and Green*, [1947] O.R. 668, where the learned justice agreed at p. 670 with the statement that I had made in *Scott v. Scott and Pfeil* that "it cannot be said with certainty that there is any exhaustive definition of collusion".

I find, therefore, that in law this was a collusive action in its inception, and in law it has been collusive throughout. I do not know whether there is any way that one can purge a collusive action once it has been commenced, I have never heard of such a thing, but right down to the plaintiff's own evidence it would appear to me that the action was still being carried on, not because she sincerely wished a divorce but because she wished to get the maximum financial allowance from her husband at the price of the divorce and because she well knew her husband was infatuated with another woman, and that in order that he might be in a position possibly to marry her, he was willing to do much more by way of financial compensation than he would otherwise do if it was a simple action for alimony. The claim for divorce will therefore be dismissed.

There is no question about the plaintiff's right to alimony. In considering what the quantum of alimony should be I am taking into consideration some allowances that Mr. Frampton has indicated he is prepared to make to his wife.

His counsel has stated that he is prepared to execute a conveyance to his wife of his half-interest in the Fleming Crescent house, to pay the outstanding arrears of taxes, and to pay the costs of a serious operation Mrs. Frampton had to undergo a few months ago. These amount to approximately \$940.77. He has already entered into an agreement to pay the principal and interest that will fall due on the mortgage on 63 Fleming Crescent.

That will give Mrs. Frampton a present allowance of practically \$11,000 on the valuation I place on the property.

He has also agreed to pay at once \$500 as an allowance for clothes and house furnishings owing to the fact that the amount of interim alimony has given Mrs. Frampton a narrow margin to live on pending this action.

In view of all these allowances, I fix the alimony that shall be paid at \$250 per month. There will be one set of costs. I think those with reference to the alimony action should be on

a solicitor-and-client basis. That does not include any solicitor-and-client costs that may have been incurred by reason of the action to set aside the first agreement. That may be a very small detail, as it was all one action.

The parties having agreed to the consolidation of the divorce action and the alimony action, the question of the costs of the divorce action does not arise, and I would make no order even if it did.

The order as to costs will therefore be that the plaintiff will have the costs of the alimony action down to judgment, it being tried with the divorce action, all as one action—only one set of costs, and that on a solicitor-and-client basis.

*Judgment accordingly.*

*Solicitors for the plaintiff: Duncan & Bicknell, Toronto.*

*Solicitors for the defendants: S. J. Kelner, Toronto.*

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[COURT OF APPEAL.]

White et al. v. The Bank of Toronto et al.

*Banks—Powers—Transfer to Bank of Controlling Shares in Manufacturing Company—Disposition of Shares after Discharge of Company's Indebtedness to Bank—Whether Transfer Absolute or as Collateral Security—Whether Bank "dealing in" Shares or Carrying on Business—The Bank Act, 1944-45 (Can.), c. 30, s. 75.*

The enabling provisions of s. 75 of The Bank Act are comprehensive rather than restrictive in scope. They permit a bank to do each of several things in respect of various commercial or financial instruments or securities. A bank may either simultaneously or separately deal in, discount, lend money and make advances on the security of, or take as collateral security, negotiable securities of any kind or stock, bonds, debentures and obligations of corporations. There is nothing in these provisions to suggest that a bank may not "deal in" the stock of its corporate debtor just as freely as it might in the stock of a corporation not its debtor or in Government bonds. There is nothing to the effect that the acquisition by a bank of shares in the capital stock of its debtor must either be by way of collateral security for the debt or be consequent upon the release of the debt. The mere fact that a bank obtains (from individual shareholders) share-control of a company that is heavily indebted to it, and that thereafter it engages an expert to advise upon and suggest improvements in the company's business methods, has a nominee or nominees on the company's board of directors, and takes an authoritative part in company matters affecting its position, does not constitute an infringement of s. 75(2)(a) of The Bank Act. If the company continues as a separate corporate entity, not a mere "sham or simulacrum" or "facade" for the bank, and maintains its corporate entity and carries on the business, subject to the control of the bank, the bank is not "engaged in trade or business" within the meaning of the statute. *Salomon v. A. Salomon and Company, Limited*, [1897]



A.C. 22; *E. B. M. Co., Ltd. v. Dominion Bank*, [1937] 3 All E.R. 555 at 564-5; *Northern Crown Bank v. Great West Lumber Co.* (1914), 7 Alta. L.R. 183, applied.  
Judgment of CHEVRIER J., [1952] O.R. 398, affirmed.

AN APPEAL by the plaintiffs from the judgment of Chevrier J., [1952] O.R. 398, dismissing the action.

14th January 1953. The appeal was heard by AYLESWORTH, GIBSON and F. G. MACKAY JJ.A.

G. A. Martin, Q.C. (C. L. Dubin, Q.C., with him), for the plaintiffs, appellants: The bank had no power to take the plaintiffs' shares without releasing the indebtedness of the company to it, unless it took them solely as collateral security. The power of the bank must be found in The Bank Act, 1934 (Can.), c. 24 (now 1944-45, c. 30): *Wenlock (Baroness) v. River Dee Company* (1887), 36 Ch. D. 674 at 685; *Amalgamated Society of Railway Servants v. Osborne*, [1910] A.C. 87. There is nothing in The Bank Act that authorizes a bank to take shares because of the indebtedness of a debtor, and to keep the debt alive after the debt is discharged, thus both receiving payment of the debt and keeping the shares.

The bank in this case was not "dealing in" the shares in the way permitted by the Act, but was operating or carrying on a business, which is expressly prohibited by s. 75(2).

There are many forms of "dealing in" shares that are beyond the powers of a bank, *e.g.*, the purchase of all the shares of a department store, a mine, or a brokerage firm; each of these transactions would constitute carrying on a particular business, wholly unrelated to banking: *The Ontario Bank v. McAllister et al.* (1910), 43 S.C.R. 338. The words "deal in" mean traffic in, buy and sell, and merely constitute a specific illustration of the bank's general residuary power. The power under s. 75(1) (c) is not wider than what is given by s. 75(1) (d), but is merely an illustration of it. To bring a "dealing" within s. 75(1) (c) it must pertain in some way to the business of banking. The situation might be different if a bank took the shares with a view to liquidating the company as a going concern. This bank is now the beneficial owner of 1517 shares of the capital stock of the company, and has received dividends on them.

*Northern Crown Bank v. Great West Lumber Co.* (1914), 7 Alta. L.R. 183, 6 W.W.R. 528, 17 D.L.R. 593, has no application to the case at bar, because there the bank had voting control

only, and was to give up that control when the indebtedness was paid; here the bank is the beneficial owner. [MACKEY J.A.: Is it your contention that since 1945 the bank has been operating the business?] Yes. I refer to Falconbridge, Banking and Bills of Exchange, 5th ed. 1935, p. 184, for a discussion of the *McAllister* case, *supra*. That case is at most authority for the proposition that a bank may take over the assets of a debtor in exchange for the amount of the debt, and with a view to selling it as a going concern. [MACKEY J.A.: In 1932 the bank had all the security it could get. Its position was that the shares were valueless. It said in effect: "We will advance you further money if you give us these shares." ] Yes, but it was still carrying on a business. The whole transaction as envisioned by the bank was beyond its powers.

In the alternative, we submit that it was the intention of the plaintiffs and of the bank that the shares should be retained by the bank only until the indebtedness was discharged, and that the bank should then divest itself of the shares by transferring them to Popkin and Bingle; in other words, the bank took the shares as collateral security only. [AYLESWORTH J.A.: I should think you would be estopped from taking that stand; the bank has altered its position.] Frequently in security transactions they are expressed as absolute in form for the protection of the person taking the security, and to give him power to deal with it. The best evidence that this transaction was intended to be by way of security only is the fact that the bank continued to keep the indebtedness of the company on its books, and continued to receive interest on the debt: Falconbridge on Mortgages, 3rd ed. 1942, p. 48. [MACKEY J.A.: One reason for doing it in that way might be in order to preserve the bank's security under s. 88.]

*C. C. Calvin, Q.C. (D. G. C. Menzel, with him)*, for the defendant bank, respondent: What the bank did in this case is directly within the explicit powers given to it by The Bank Act. There is no reason to think that Parliament intended the words "deal", "deal in" and "dealing" to bear any different meaning from that given to them in ordinary use. [AYLESWORTH J.A.: There are no restrictions on the powers of a bank under subs. 1 of s. 75; certain prohibitions are set out in subs. 2, but they are preceded by the words "Except as authorized by this Act". Does that mean, or is it arguable, that since a bank is permitted

by subs. 1(c) to deal in the stock of corporations it may, by exercising that power, engage directly or indirectly in a trade or business, notwithstanding subs. 2(a)?] I think so, but we do not need to go as far as that in this case. Our submission here is that the mere holding of shares is not a carrying on of a business.

The existence of a company as a separate and distinct legal entity is decisive, and one cannot go behind it: *Salomon v. A. Salomon and Company, Limited*, [1897] A.C. 22; *E.B.M. Co., Ltd. v. Dominion Bank*, [1937] 3 All E.R. 555 at 564-5, [1937] 3 D.L.R. 513, [1937] 2 W.W.R. 568 (*sub nom. Export Brewing and Malting Company Limited v. Dominion Bank*); *Northern Crown Bank v. Great West Lumber Co.* (1914), 7 Alta. L.R. 183, 6 W.W.R. 528, 17 D.L.R. 593 at 594, 600, 611.

The plaintiffs did not plead lack of consideration, and in any event there was ample consideration for the 1932 transaction. The bank undertook to extend further credit to keep the company afloat, and it did so. It saved the name of the White family, and saved the company from going into bankruptcy; it also saved the investment of the employees. In the 1938 transaction the members of the family got \$570,000, which they could have got only by the bank agreeing to the payment. It is sufficient consideration if the bank acted to its detriment, as it did: 4 C.E.D. (Ont.), 2nd ed. 1950, p. 62.

There is nothing to support the appellants' submission that the powers under s. 75(1)(c) must be restricted to dealings connected with the business of banking. The words should be construed in their ordinary meaning.

We never had control on the board of directors, and in view of that fact it cannot be reasonably argued that we were carrying on the business.

In *The Ontario Bank v. McAllister et al.* (1910), 43 S.C.R. 338, there was no incorporated company concerned. The bank had bought a business from individuals, and was carrying it on.

*G. L. Mitchell, Q.C.*, for the defendant Popkin, respondent: The only substantial allegation against us was contained in para. 13 of the statement of claim, and that allegation was withdrawn before the trial judge. If there is no case against us we should not be brought before the Court.



*G. A. Martin, Q.C.*, in reply: [AYLESWORTH J.A.: It was not unusual in the 1930's for banks to make companies consult them before paying any accounts.] That is true, but the bank in this case itself took the position that it was the beneficial owner of these shares. The owner of shares is carrying on a business, at least indirectly, since that word contemplates an intermediary.

*Cur. adv. vult.*

22nd April 1953. The judgment of the Court was delivered by

AYLESWORTH J.A.: This is an appeal from the dismissal, with costs, of the appellants' action by Chevrier J. on the 31st March 1952. The action concerns certain shares in the capital stock of George White & Sons Company Limited presently held by the respondent bank. From the pleadings, which are none too clear in this respect, appellants would appear to be claiming for the return of the shares to the estate of the late Arthur William White. The facts require a somewhat lengthy recital, but essentially they are comparatively simple.

George White & Sons Company Limited was and is engaged in the manufacture of industrial machinery. Its capitalization prior to 30th May 1932 consisted of 3,500 class "A" preferred shares of the par value of \$100 each, and 1,050 class "B" common shares of the par value of \$100 each. On or about that date 2,500 of the class "A" preferred shares were converted into 2,500 class "B" common shares and the issued and outstanding capital of the company since that time has remained at 1,000 class "A" preferred shares and 3,550 class "B" common shares. The locale of the company's activities is at London, Ontario. Until certain assignments of shares in the capital stock of the company were made to the bank in 1932, as hereinafter mentioned, members of the White family controlled the company; three brothers owned a total of 2,500 of the class "A" shares as follows: Arthur William White 931, Fred J. White 1,001 and Ernest Albert White 568; members of the White family, other than the three brothers, owned, or at least held in their name, the other 1,000 class "A" shares. The 1,050 class "B" common shares were held and presently appear still to be held substantially by employees of the company other than the Whites, including the respondent Popkin and (until 1938) one Bingle. The White family, through a company re-organization in 1926, had secured distribution of company assets

in excess of \$500,000, and it would seem that at or about the same time employees of the company other than members of the White family originally became the holders of certain of the class "B" common shares, or at least became holders of a substantially-increased number of such shares. By 1932 the company's indebtedness to the bank had reached nearly \$600,000. The company had become insolvent and, unless further financing was made available to it, was facing bankruptcy. The request of the bank that members of the family come to the assistance of the company by affording it financial support was refused and early in March of 1932 the bank advised Arthur William White, the real business head of the company, that the company would either have to be liquidated or control would have to be given to some one in whom the bank had confidence and that 2,500 "A" shares of the company's capital stock must be turned over to the bank.

The learned trial judge has found as a fact, and I concur in that finding, that agreement as to what was to be done was finally reached and embodied in a document dated 28th March 1932, which appears as ex. 8. I quote it in full:

"London, March 28th, 1932.

"H. B. Henwood, Esq.,  
General Manager, Bank of Toronto,  
Toronto.

"Dear Sir: Re *George White & Sons Company Limited*.

We hand you herewith, duly endorsed in blank, share certificates of George White & Sons Company, Limited, A stock, totalling 2,500 shares, par value \$250,000. These shares are transferred by us to your nominee, R. Pashby, in trust, not as collateral or as security in any way, but as an absolute and final transfer of the shares, to be used in such way as the General Manager of the Bank of Toronto may from time to time in his absolute discretion see fit, without accounting to the undersigned in any way in connection therewith.

"It is understood that before any A shares are redeemed pursuant to the provisions of the Letters Patent of the Company, you will take the necessary corporate action to have the 2,500 shares now transferred to Mr. Pashby changed by Supplementary Letters Patent from A shares to B shares, and we agree on our

part to co-operate with you in voting the remaining shares held or controlled by us to carry out the said change.

“Yours truly,

“Arthur W. White

“E. A. White

“Fred J. White.”

Simultaneously, although under date of 23rd March 1932, the respondent bank entered into an agreement with Popkin and Bingle (ex. 10), which reads as follows:

“THE BANK OF TORONTO,  
Head Office,

“Toronto 2,  
Canada,  
23rd March, 1932.

“Messrs. Ernest Popkin and Hamilton Bingle,  
c/o George White & Sons Co. Ltd.,  
London, Ontario.

“Dear Sirs:—

Messrs. Arthur W. White, Fred J. White and Ernest A. White have transferred to Mr. R. Pashby in trust, 2,500 A shares of the capital stock of George White & Sons Company, Limited, having a par value of \$250,000. We propose taking the necessary corporate action to procure supplementary Letters Patent converting these 2,500 shares from A shares to B shares, and we desire your co-operation in effectuating the said change.

“In view of the amount of stock now standing in Mr. Pashby’s name, we desire to nominate at least one member of the Board and will expect your co-operation in securing the election of such nominee.

“In consideration of your co-operation in connection with the matter, and provided you are officers of the said Company, we agree to have transferred to each of you during each of the next five years, 50 shares each of the said Pashby stock, on condition that you from time to time grant to Mr. Pashby and/or the nominee of the Bank a proxy on the shares transferred to you, in order to preserve voting control in Mr. Pashby. As and when the Bank’s advances to George White & Sons Company,



Limited, have been fully paid, the remaining Pashby stock, namely 2,000 shares, shall be divided and transferred to such persons and corporations (including the Bank of Toronto) as the General Manager of the Bank of Toronto for the time being may in his absolute discretion then decide, having regard to the services rendered to the Company during the intervening period by the said persons and/or corporations. The 50 shares of stock to be assigned to each of you to be assigned on or before April 1st in each year, the first transfer to be made on before April 1st, 1933.

“Yours truly,

“H. B. Henwood

“General Manager.”

Under date of 10th March 1932, Arthur William White had written to the bank on behalf of his two brothers and himself in connection with the bank's request as it then stood for transfer to it of the 2,500 shares of the company's "A" stock, that: "Our only reason for entering into this agreement is to assist the old firm of George White & Sons Co. to continue in business, in order that the Bank may be paid off and the stockholders among our staff and working men may not lose in their investments."

Upon completion of the matters mentioned in ex. 8 the bank continued to deal with and lend money to the company and as time wore on the bank transferred to each of Popkin and Bingle a total of 250 class "B" shares of the company. While the total of the indebtedness to the bank remained practically unchanged as of the end of 1937, the financial position of the company as compared with the year 1932 was worse by some \$482,000, and the bank at that time considered its loan to the company a bad loan to the extent of \$400,000.

In 1936 the bank retained the services of one L. V. Wright, a management consultant particularly familiar with the type of business carried on by the company. The bank early in 1938 expressed itself as no longer willing to permit the company to carry on unless all of the outstanding 1,000 shares of preferred class "A" stock were turned over to it by the members of the White family. The late Arthur William White agreed to endeavour to arrange this and after some delay and after certain negotiations, during which the bank at one time took steps to

prevent the company from making any further payments even to its trade creditors, the bank agreed to facilitate the retirement of an indebtedness of the company in the amount of \$5,700 to a member or members of the White family and compliance was made with its demand for the 1,000 class "A" shares. Each member of the White family not only surrendered, or acquiesced in the surrender of, the certificates in their respective names for the class "A" shares but also executed an acknowledgment addressed to the bank stating that the writer of the acknowledgment had "no interest in any of the class 'A' shares of George White & Sons Company Limited, certificates for 1,000 shares of which have been transferred or delivered to your agent". The learned trial judge has found that these class "A" shares were transferred to the bank absolutely and not by way of collateral security and in my view all of the evidence supports that finding. As appears from the evidence, the members of the family at that time considered that such stock as they held in the company was of no value. The situation was so bad that the bank seriously considered liquidation of the company's affairs; as Mr. Hanley, the branch supervisor of the respondent bank, put it: "The Whites did not want to see the business wound up. It was a matter of saving the family name, and at that time they were quite ready to turn over to us the balance of their shareholdings provided we would continue the business and see what we could do with it."

At or about the same time as the transfer of these class "A" preferred shares to the bank, the bank requested Messrs. Popkin and Bingle to turn over to the bank some or all of the class "B" shares of the company respectively held by them, and this was done.

Shortly before the receipt by the bank in March 1938 of the 1,000 class "A" shares from members of the White family, Arthur William White had secured from the respondent Popkin, unknown to the bank, a written agreement stipulating that if at any time within 10 years from the date of the agreement the bank should turn over to Popkin 60 per cent. of the capital stock of the company, or any greater part thereof, Popkin in turn would assign to Arthur William White 40 per cent. of all such stock. Arthur William White had requested Popkin not to tell the bank about this agreement and in fact the bank never learned of it until some years later, when Popkin finally

disclosed its existence. Arthur William White in turn had undertaken with his brothers to divide with them any shares he received under his agreement with Popkin.

In the early 1940's the position of the company began to improve. A substantial reduction in the bank loan was made in the year 1942 and by 1945 the position of the company was such that upon a liquidation at that time the bank would have been able to secure complete, or substantially complete, repayment of its loan. On 25th June 1945 an agreement was entered into between the bank and Popkin (Bingle having left the company in 1938), whereby 2,250 class "B" shares in the company were transferred by the bank to Popkin. Since that date the bank has retained all of the 1,000 class "A" preferred shares of the capital stock of the company and 517 class "B" common shares. Of the 2,250 class "B" common shares transferred to him, Popkin in turn transferred, in varying amounts, a total of 450 of such shares to other company employees. The agreement between the bank and Popkin concerning the transfer by the former to the latter of the 2,250 class "B" shares recites that the company's indebtedness to the bank had been paid in full; this had been accomplished by the bank acquiring from the company \$200,000 of its first mortgage bonds and by retirement accordingly of the unpaid balance of the general loan.

Arthur William White died on 16th July 1941, never having questioned the transactions to which reference has been made. The writ in this action was issued on 11th February 1948.

As I have said, the action would appear to be for the delivery to the estate of Arthur William White of all of the shares acquired by the bank from the various members of the White family, whereas the late Arthur William White personally transferred to the bank only 931 class "A" shares (now 931 class "B" shares). Another of the three White brothers, namely, E. A. White, who transferred 568 of what are now class "B" shares, is made a defendant and he makes no claim in respect thereof; the third brother, Fred J. White, who transferred 1,001 of such shares to the bank, is dead and his personal representatives are not before the Court; only two of those members of the family who transferred the 1,000 class "A" shares to the bank in 1938 are parties to the action, namely, the plaintiffs, and they appear to claim not personally but as representatives of the Arthur William White estate; finally, none of the persons to whom



transfer of 450 class "B" shares was made by the respondent Popkin is made a party to the action. For these reasons appellants, if successful, may only recover in respect of 931 class "B" shares.

The primary claim is for "a declaration that the transaction relating to the assignment of the aforesaid shares is null and void as being *ultra vires*". Alternatively, appellants claim in essence for a declaration that the respondent bank held all such shares as collateral security only and agreed to assign them all to the respondent Popkin as soon as the company's bank indebtedness was paid, and for damages for breach by the bank of that agreement. A further claim is made against the respondent Popkin for damages on the ground that he had induced the bank to break its alleged agreement so to turn over to him all of the shares held by it, but this claim was abandoned at the trial. Agreeing as I do with the learned trial judge's findings that both those shares transferred to the bank in 1932 and those transferred in 1938 were transferred not as collateral security but absolutely, I turn to a consideration of the legal position of the bank upon the facts as so found.

Appellants impugn the share transactions as being both beyond the powers conferred upon the bank under The Bank Act, now 1944-45 (Can.), c. 30, and within the class of acts specifically prohibited thereby; they say that the bank could not take the shares otherwise than as collateral security without discharging the company's indebtedness and, further, that upon a proper consideration of all of the circumstances the bank was indirectly if not directly engaged in the business of the company.

At all relevant times the following provisions are to be found in The Bank Act in the precise language in which they appear in R.S.C. 1927, c. 12, s. 75, which I quote in part:

"The bank may . . .

"(c) deal in, discount and lend money and make advances upon the security of, and take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British, foreign, and other public securities; and

“(d) engage in and carry on such business generally as appertains to the business of banking.

“2. Except as authorized by this Act, the bank shall not, either directly or indirectly,

“(a) deal in the buying or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever;”

The enabling provisions of this section are comprehensive, not restrictive, in scope; they permit a bank to do each of several things with respect to various commercial or financial instruments or securities; thus a bank may simultaneously or separately deal in, discount (where the nature of the instrument or security is appropriate), lend money and make advances upon the security of, or take as collateral security, negotiable securities of any kind or stock, bonds, debentures and obligations of corporations. I can find nothing in these provisions to suggest that a bank may not “deal in” the stock of its corporate debtor just as freely as it might deal in the stock of a corporation not its debtor or, for that matter in bonds of the Dominion of Canada. Reducing s. 75(1) (c) to the essential provisions touching this appeal, it reads: “The bank may deal in the stock of corporations.” Nothing is said to the effect that the acquisition by a bank of shares in the capital stock of its debtor must either be by way of collateral security for the debt or be consequent upon the release of the debt. The conduct of modern business inevitably leads to an infinite variety of situations, not the least complicated of which may occur in the carrying on in this country of “such business generally as appertains to the business of banking” and it seems to me that this has been recognized throughout the numerous decennial revisions of The Bank Act by the use of broad and general terms in prescribing what a bank may do.

In the instant case, the stock transactions concerning which complaint is now made were transactions directly between certain of the company's shareholders and the bank, not between the debtor company and the bank, although the company stood to benefit and did benefit thereby. The members of the White family refused to come to the financial assistance of the company bearing their name and in which several of the employees held common “B” stock; yet the members of the family wished “to assist the old firm of George White & Sons Co. to continue in

business"; they were reluctant to see the company put into bankruptcy, although plainly it was insolvent in 1932 and still insolvent in 1938. The bank dealt with the Whites in respect of their shares by insisting upon the absolute surrender thereof as the price and the means of continuing to act as the company's banker and continuing to exploit the possibilities of the company's rehabilitation. It withheld its hand from bankruptcy or liquidation proceedings, took the risk of postponement of realization upon its securities, arranged for new company management and generally sustained the company through a long and difficult period; in short, it carried out to the full its part of the deal with the assignors of the shares. I think it was quite competent to the bank to deal in the shares in this manner and I think the arrangements they made in the acquisition of the shares of the debtor company was an arrangement with respect to those shares or a "dealing" therein permitted by the provisions of s. 75 of the Act.

But appellants say that, viewing the circumstances as a whole, the bank was engaged in the business of the company; I think this contention fails also. It is true that the bank held share control (although by no means did it hold all of the shares in the capital stock of the company), that it engaged an expert to advise upon and suggest improvements in the company's business methods, that it had a nominee or nominees on the company's board of directors, and doubtless that it had an authoritative voice in company matters affecting its position. But that is not enough to offend against the statute. The company was no mere "sham or simulacrum" or "facade", as some of the authorities express it; it was no *alter ego* of the bank; in fact at all times it retained its separate corporate entity, the business was its business not the bank's, and it carried on that business. *Salomon v. A. Salomon and Company, Limited*, [1897] A.C. 22; *E.B.M. Co., Ltd. v. Dominion Bank*, [1937] 3 All E.R. 555 at 564-5, [1937] 3 D.L.R. 513, [1937] 2 W.W.R. 568 (*sub nom. Export Brewing and Malting Company Limited v. Dominion Bank*). The principle exemplified in the decisions which have been cited finds expression in innumerable other decisions to the like effect. An apt statement of that principle as it applies to the situation here is to be found in the judgment of Stuart J. sitting as one of the members of the Supreme Court of Alberta in appeal in the case of *Northern*



*Crown Bank v. Great West Lumber Co.* (1914), 7 Alta. L.R. 183 at 202, 6 W.W.R. 528, 17 D.L.R. 593 at 594:

"I think it is impossible, without destroying the essential nature of a joint stock company as a separate legal entity created by our statute law, to say that a bank which legally acquires control of a majority of the shares in a joint stock company organized to engage in trade or business and, by observing the formal procedure necessary to exercise control of the company, does so exercise control is thereby indirectly carrying on that trade or business . . . But where the control is exercised merely by acquiring shares in the company and by taking advantage of the legal machinery created by the companies' ordinance, then, to deny that it is the company, and the company only, which is carrying on business is in my opinion tantamount to destroying the whole effect and intended result of the legislation with respect to joint stock companies."

The appeal therefore fails and will be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitor for the plaintiffs, appellants: G. A. Martin, Toronto.*

*Solicitors for the defendant The Bank of Toronto, respondent: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.*

*Solicitors for the defendant Popkin, respondent: Mitchell & Hockin, London.*

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[COURT OF APPEAL.]

**Richardson et al. v. Equitable Fire Insurance Company et al.**

*Insurance — Fire Insurance — Ownership of Property — Tenant's Fixtures — The Insurance Act, R.S.O. 1950, c. 183, s. 108, stat. con. 4. Fixtures — Ownership — Tenant's Fixtures — Terms of Lease — Permission to Remove Fixtures "without injury to premises" — The Short Forms of Leases Act, R.S.O. 1950, c. 361, sched. B., cl. 10.*

One M rented from the owner (M's mother) a piece of land on which was a building. The property was rented by M for the purpose of establishing and carrying on a business, in connection with which he installed, *inter alia*, an elevator and shaft and a smoke-house. M, who had no written lease, subsequently sold the business and all equipment to the plaintiffs, who thereupon entered into a written lease with the owner under which they had permission to remove their fixtures "if such removal may be, and is, done without injury to the said premises". The building was destroyed by fire, and the insurers declined to pay indemnity for the elevator, elevator-shaft and smoke-house, on the ground that they were "owned by [a] person other than the insured", within statutory condition 4 of the policies.

*Held* (reversing the judgment of the trial judge), the plaintiffs were entitled to indemnity for these items of loss.

M had rented the building for the purpose of establishing in it a business that involved the purchase and installation of fixtures, and these items, being things affixed to the freehold by the tenant for the purpose of his trade, were trade fixtures, and remained his property and could be taken away during or at the end of the term, there being no evidence of any stipulation to the contrary, express or implied, in the oral lease to him. Since M was the owner of the fixtures, he could pass title in them to the plaintiffs. It was not necessary to decide whether, under the written lease, the plaintiffs would have been entitled to remove the items at the end of the term or any renewal of it, since the question was merely as to the ownership at the time of the issuing of the policies and at the time of the loss.

Further, apart from the effect of affixing the items to the freehold, and regardless of whether or not they could have been removed by a tenant, they were at least "owned" by the plaintiffs to the extent required by statutory condition 4, as interpreted in such cases as *Drumholus v. Home Insurance Co.* (1916), 37 O.L.R. 465, and *Ritchie and Dobbie v. Stanstead and Sherbrooke Fire Insurance Company*, [1940] O.W.N. 39.

AN APPEAL by the plaintiffs from the judgment of Aylen J., awarding the plaintiffs only part of the amount claimed by them as indemnity under policies of fire insurance.

9th April 1953. The appeal was heard by PICKUP C.J.O. and HOGG and F. G. MACKAY JJ.A.

*F. Erichsen-Brown, Q.C.*, for the plaintiffs, appellants: The point at issue is whether the policies of fire insurance covered the smoke-house, elevator and elevator-shaft in our premises. Our first proofs of loss were submitted for a total amount of \$8,000. Six insurers paid, but the respondent sent our proofs back and asked us to delete the smoke-house, elevator and elevator-shaft. These three items totalled about \$3,000. Subsequently it was found that the valuation of \$8,000 in all was too low, and we put

on a new value of \$12,000. The proper amount to be paid is the actual value to the insured: *The Canadian National Fire Insurance Company et al. v. Colonsay Hotel Company et al.*, [1923] S.C.R. 688, [1923] 2 D.L.R. 1001, [1923] 2 W.W.R. 1170; *Ritchie and Dobbie v. The Stanstead and Sherbrooke Fire Insurance Co.*; *Ritchie and Dobbie v. Gore District Mutual Fire Insurance Co.*, [1940] O.W.N. 39, 7 I.L.R. 41, [1940] 1 D.L.R. 241. If the machinery and plant have been kept up to value by proper repairs, as happened in this case, the insurer is entitled to full value. Replacement cost may be higher than original cost. We proved \$15,000 as the cost of replacement. The proof of loss is not conclusive; the insurance company takes a chance if it does not pay at once. [PICKUP C.J.O.: Must not the insured submit a proof of loss for the full amount claimed before he sues?] No; we did put in proofs of loss and they were rejected. [PICKUP C.J.O. But is not a proof of loss a condition precedent to the right to bring an action?] Yes, but we did submit a proof of loss. That does not tie us down. We did everything we were supposed to do and we were turned down. The contract is to pay the amount of the loss, not what is in the proof, which is merely part of the mechanism of getting the loss paid. [PICKUP C.J.O.: Apart from what was proved at the trial, were there any proofs of loss other than the original ones claiming \$8,000?] No.

These three items in dispute are listed in all the policies. They were not put in for general use, but to make the building better fitted for the business for which it was to be used. The whole trend now is to relieve a lessee from the strict law as to fixtures. [PICKUP C.J.O.: Does the lease provide for the removal of fixtures?] Yes; it is the long form of lease. [MAC-KAY J.A.: The real argument is whether these are fixtures.] Yes, but I do not want to abandon my argument that they are betterments or improvements. As to what are trade fixtures, I refer to 20 Halsbury, 2nd ed. 1936; The Short Forms of Leases Act, R.S.O. 1950, c. 361, sched. "B", item 10; *Leigh et al. v. Taylor et al.*, [1902] A.C. 157.

I ask for leave to amend our claim as to quantum to conform with what we proved at the trial. Even if the Court disallows these three items our loss is greater than the amount for which judgment was given. We are entitled to recover for a total



equipment loss of \$15,185.22 according to the proportionate amounts of the insurance: *The Canadian National Fire Insurance Company et al. v. Colonsay Hotel Company et al.*, *supra*; *Rockmaker v. Motor Union Insurance Co. Limited* (1922), 52 O.L.R. 553 at 562, 70 D.L.R. 360.

*J. F. McGarry, Q.C.*, for the defendants, respondents: Proofs of loss were filed for stated amounts. While there were queries as to three items, the amount of the proof of loss was paid before the writ was issued, but it was sent back and was later paid into court.

We take the position that we did not insure these three items, since they were not owned by the plaintiffs. Their predecessors in title could not give title because the items had become attached to the freehold.

We have served a notice of application to vary the judgment; the trial judge, rather than assessing on the amount set out in the statement of claim, should have assessed on the basis of the proofs of loss.

It is true that the plaintiffs' predecessor in title intended to convey these three items, but he could not do so, since they belonged to the landlord. If the elevator were removed there would be holes in both floors. [MACKAY J.A.: That could be repaired.] [PICKUP C.J.O.: On the evidence these three items were in fact sold, whether or not the predecessor in title had a right to sell them, and there is no evidence that he did not have that right.] I submit there is such evidence. The extended form of the covenant under The Short Forms of Leases Act cannot apply here because the covenant used in the lease is not the short form authorized by the Act.

The *Ritchie and Dobbie* case, *supra*, seems to say that a lessee may be an "owner", but none of the cases referred to in that case concerned statutory condition 4. [MACKAY J.A.: Is not a lessee the owner of an interest in land?] That may be, in some circumstances, but he is not an owner within the meaning of the statutory condition. [MACKAY J.A.: People with long-term leases often insure the buildings.] Yes, that was the situation in the *Ritchie and Dobbie* case, but it can apply only to a lease for a very long term.

*F. Erichsen-Brown, Q.C.*, in reply.

*Cur. adv. vult.*

29th April 1953. PICKUP C.J.O:—This is an appeal from the judgment of Aylen J. pronounced on 12th November 1952, in an action tried without a jury.

The plaintiffs' action was to recover indemnity in respect of a fire loss which occurred on 17th March 1952. The learned trial judge gave judgment in favour of the plaintiffs as follows: against the Equitable Fire Insurance Company, \$1,435.77; against the Merchants and Manufacturers Insurance Company, \$1,435.77; against Baloise Fire Insurance Company Limited, \$1,005.03, and against Lloyd's of London, \$2,153.64. From this judgment the plaintiffs appeal on the ground that the learned trial judge erred in not including in the amount recovered the loss sustained by the plaintiffs in respect of three items alleged to be insured under the insurance policies which are in question. These three items consist of an elevator, an elevator-shaft and a smoke-house. The learned trial judge held that the three items referred to were not covered by the policies because the plaintiffs were not the owners thereof, and, therefore, such items were excluded from the policy by the operation of statutory condition 4 under s. 108 of The Insurance Act, R.S.O. 1950, c. 183. The relevant part of this statutory condition reads as follows:

"Unless otherwise specifically stated in the policy, the insurer is not liable for the losses following, that is to say:

"(a) for loss of or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the policy."

There are no facts in dispute. The defendants called no evidence and the rights of the parties fall to be determined on the written documents and the evidence given on behalf of the plaintiffs.

The land and buildings are owned by the estate of the late Victoria Moody. About 1926 Mrs. Moody rented the premises to her son, C. W. Moody, for the purpose of operating a meat-supply business which Mr. Moody proposed to establish, and which he did establish and conduct under the name "Elgin Meat Supply Limited". At that time the building was only a stable. C. W. Moody first put in a cement floor. Later he put in a second storey and installed the elevator and smoke-house now in question. These were installed for the purpose of carrying on

his trade. The elevator was for the purpose of moving hogs from the second floor to the first floor. The smoke-house was to hold products, and included steel doors and tracks inside the smoke-house. There was a gas-burner, which was used to burn sawdust, and also temperature controls. These were part of the smoke-house. There was no written lease.

In 1939 C. W. Moody rented another building from his mother and paid an additional rental for the use of that building. Still there was no written lease.

In March 1949 C. W. Moody sold all the business of Elgin Meat Supply Limited, including all of the plant, machinery, tools and equipment of the business to the plaintiffs. This agreement was in writing. A bill of sale of certain chattel property was executed and delivered, and although the elevator, elevator-shaft and smoke-house are not referred to in the bill of sale, the evidence clearly shows that these items were included in the sale. After the sale the plaintiffs entered into a lease with the owner of the land and building, that is, Victoria Moody, which lease is in the usual form of a lease of land and building and makes no reference to any of the plant, machinery or equipment which had been installed by the previous tenant.

The learned trial judge was of the opinion that the three items in question became the property of the owner of the land when they were affixed by the prior tenant to the freehold, and that therefore the vendor to the plaintiffs, not being the true owner, could not transfer the property in these three items to the plaintiffs.

With all respect to the opinion of the learned trial judge, I am unable to agree with this view on the facts of this case. When the previous tenant entered into the arrangement with Mrs. Moody the building was only a stable and he rented it for the purpose of establishing therein a business which involved the purchase and installation of fixtures necessary for the carrying on of his business. The items in question were, in my opinion, trade fixtures and, being things which the tenant had affixed to the freehold for the purpose of his trade, they remained his property and could be taken away by him during the term unless the removal was contrary to any express or implied stipulation in the agreement with the owner of the land. There is no evidence in this case which suggests that the removal of these



fixtures by C. W. Moody or Elgin Meat Supply Limited, during the term of the lease that existed prior to the lease to the plaintiffs, was contrary to any express or implied agreement with the owner of the land. On the contrary, Mr. Moody was asked at the trial if his mother had any interest in these items. His answer was that she never at any time in her life had any interest in the business. This statement was not pursued by counsel in an effort to make more clear what the witness meant, but there was put in as an exhibit at the trial a statutory declaration which had previously been made by Mr. Moody and furnished to the respondents as proof of ownership of the items in question. This declaration showed that Mr. Moody was the sole owner of Elgin Meat Supply Limited; that he sold the goodwill, contents and stock-in-trade to the plaintiffs; that included in the sale was the elevator, elevator motor and shafting, and that the elevator was placed in the building by him and was not considered part of the building as the building was owned by Victoria Moody. In the circumstances, therefore, I think it should be held that the removal of these trade fixtures by the previous tenant was not contrary to any agreement with the owner of the land. It follows, I think, that the vendor of the business to the plaintiff was, at that time, the owner of these trade fixtures and could pass title thereto to the plaintiffs in the sale of the business to the plaintiffs.

It was argued, however, by counsel for the defendants that the plaintiffs could not remove these fixtures because of the terms of the written lease made between the plaintiffs and the owner of the land after the plaintiffs purchased the business from the previous tenant. That lease was made pursuant to The Short Forms of Leases Act, R.S.O. 1950, c. 361, and contained the provision that the lessee might remove his fixtures "if such removal may be, and is, done without injury to the said premises". The words added to the short form are different from the concluding words of the long form as set forth in schedule "B", clause 10, of the Act. The difference is that the long form permits removal of trade or tenant's fixtures, but provides that the lessee "shall in such removal do no damage to the said premises, or shall make good any damage which he may occasion thereto", whereas the words contained in this lease raise the question whether the plaintiffs can remove their trade

or tenant's fixtures at all if such removal may not be done, and is not done, without injury to the premises.

I do not think that we need decide in this case whether or not at the expiration of the term or at the expiration of any renewal thereof provided for by the lease the plaintiffs could remove these fixtures. We are in this action concerned with the ownership of them at the time of the issuing of the policies, and at the time of the loss. If, as I have stated, these items became the property of the plaintiffs on the sale of the business to them, they would remain the property of the tenant during the term of the lease or any renewal thereof, and the only effect of the clause in the lease as to removal of fixtures would relate to the question of removal, which does not arise until the end of the term or the end of any renewal of the lease. It may be that the effect of this clause would have been to prevent the removal of these items by the plaintiffs at the expiration of the term or renewal, if the fire had not occurred during the term, but I need not be concerned with that question in this case because I am of the opinion that during the term and renewal these items were not "owned by any person other than the insured", within the meaning of statutory condition 4.

In any event, apart from this question of the effect of affixing these items to the freehold, and regardless of whether they could have been removed by the previous tenant or whether they can be removed by the plaintiffs at the expiration of their present lease or any renewal thereof, they are not excluded from the policy, in my opinion, by reason of statutory condition 4 because in the facts of this case they were not owned by the landlord within the meaning of the word "owned" as used in that condition.

In the case of *Drumbolus v. Home Insurance Co.* (1916), 37 O.L.R. 465, the late Mr. Justice Hodgins considered the meaning of the statutory condition that is in question in this appeal in relation to property purchased by the assured under a conditional sale agreement whereby the ownership of the property and title to the property remained in the vendors. In that case the Court held that the vendors were not really "owners" although the property remained in them until payment, and that the property should not be considered as being owned by any other person than the assured, within the meaning

of the statutory condition. At p. 468 Hodgins J.A. said: "I think, under these circumstances, that the plaintiff may maintain an action for this portion of the loss. The fountain and accessories etc. are his 'property' in the popular sense, though the legal title is in the McLaughlins."

In *Ritchie and Dobbie v. The Stanstead and Sherbrooke Fire Insurance Co.*; *Ritchie and Dobbie v. Gore District Mutual Fire Insurance Co.*, [1940] O.W.N. 39, 7 I.L.R. 41, [1940] 1 D.L.R. 241, Riddell J.A., delivering the judgment of this Court, considered the meaning of the statutory condition and said at p. 39:

"This brings into consideration the meaning of the word 'owned' in the Condition. The Court is of the opinion that this is fully and conclusively settled by the decisions in our own and the English Courts.

"Stroud's Judicial Dictionary, vol. 2, p. 1387, under the heading 'Owner' correctly states the law in England thus—"The word "Owner" or "Proprietor" of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation, or control, or usufruct of it: e.g., a lessee is during the term, the owner of the property demised.'"

In both of these cases the Court held the assured to be the owner for the purpose of interpreting such insurance policies. In my opinion the reasoning of the cases referred to applies with more force to the facts of the instant case.

There was some discussion on the argument of the appeal as to whether, apart from the question of ownership, the items in question were included in the policies which are under consideration in this action. I think they plainly come within the coverage in the policy under the heading "Equipment". Being trade fixtures they were fixtures within the meaning of the equipment coverage contained in all of the policies.

It follows, in my opinion, that the three items, namely, the elevator, elevator-shaft and smoke-house, should have been included in computing the indemnity to which the plaintiffs are entitled under the policies in question, and that the amount awarded to the plaintiffs in this action should be increased accordingly.

In the proofs of loss submitted to the insurance companies prior to the commencement of the action, the total equipment



loss was shown as being \$7,959.33. These proofs of loss, however, were not accepted by the respondents, and the figures of loss were later revised by the plaintiffs so that the amount claimed in this action in respect of equipment was based upon a total equipment loss of \$12,057.00. At the trial the plaintiffs proved the equipment loss to be more than pleaded and the figures proved at the trial were \$15,185.22. The plaintiffs asked leave to amend at the trial, so as to be able to claim on the basis of the amount of loss proved at the trial. This application for amendment was refused by the learned trial judge. Counsel for the plaintiffs now asks that this Court grant such permission to amend. I think such amendment ought to be refused.

Counsel for the respondents asks this Court to vary the judgment pronounced in the Court below by limiting the amount recovered to the amount recoverable based upon the equipment loss being the amount shown in the original proofs of loss, notwithstanding that the action proceeded on the basis of the loss being greater than that shown by the proofs of loss. I would not grant this variation.

The appeal should be allowed and the judgment of the plaintiffs against each of the defendants should be increased so as to include the proper proportion of loss payable by each of the respondents in respect of the three items in question, based upon the total equipment loss being the sum of \$12,057. I understand from counsel that there will be no difficulty in computing the figures, but if there is, a member of the Court may be spoken to on settlement of the order of this Court.

The learned trial judge refused costs of the action to the plaintiffs and directed that the defendants should recover from the plaintiffs their costs of the action. In the result the disposition of costs in the Court below should be varied. The plaintiffs should not be ordered to pay the costs of the defendants, but the plaintiffs should be paid by the defendants their costs of the action and of the appeal.

HOGG J.A.:—I agree with the disposition made of this appeal by my Lord the Chief Justice and with his reasons therefor.

We have had the advantage of having had several cases cited to us which are in point, and which do not appear to have been brought to the attention of the learned trial judge, and upon a

more careful consideration of the matter than could be given in the hurry of a trial, we have arrived at a different conclusion.

F. G. MacKAY J.A. agrees with PICKUP C.J.O.

*Appeal allowed with costs.*

*Solicitors for the plaintiffs, appellants: Erichsen-Brown and Leal, Toronto.*

*Solicitor for the defendants, respondents: John F. McGarry, Toronto.*

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[COURT OF APPEAL.]

**Stewart and Stewart v. Speer.**

*Trials — Jury Trials — Addresses of Counsel and Judge to Jury — Discussion of Amount of Damages to be Awarded — Appeal to Jury's Emotions — Prejudicial Remark by Trial Judge — Effect of Failure to Object at Trial.*

*Appeals — Grounds of Appeal — When Appellant Permitted to Raise Grounds not Taken at Trial.*

Although counsel, in addressing a jury, may make use of rhetoric verging on the extravagant, his language should not be such as is likely to prejudice his opponent in the minds of honest men of fair intelligence to such an extent as to work an injustice; in particular, it must not lead the jury to reach a verdict on the basis of their emotions rather than of the evidence.

It is not the rule in Ontario that the amount of damages claimed by the plaintiff must not be disclosed to the jury. But if they are mentioned it should be made clear to the jury that the amount to be awarded is entirely for them to decide, and they should not be permitted to think, merely because a particular amount has been mentioned to them by counsel that it is their duty to fix the damages at that amount. *Bradenburg v. Ottawa Electric R.W. Co.* (1909), 19 O.L.R. 34; *Pender v. Hamilton Street R.W. Co.* (1917), 12 O.W.N. 262; *Misner v. Toronto and York Radial R.W. Co.* (1908), 11 O.W.R. 1064, applied.

It is a basic principle that while a trial judge, in charging the jury, is entitled to express his own opinion, he must, if he does so, make it clear to them that it is not a direction that they are bound to follow. *The Montreal Tramways Company v. Séguin* (1916), 52 S.C.R. 644, applied. He should not give them an over-drawn picture of the plaintiff's injuries, not reasonably supportable on the evidence, in such a way that they may be led to think that it is their duty to accept it in fixing the damages. *Johnston v. Great Western Railway Company*, [1904] 2 K.B. 250; *Sentinel-Review Co. Ltd. v. Robinson* (1927), 61 O.L.R. 62 (reversed on other grounds, [1928] S.C.R. 358), applied.

There is no rule that absolutely prohibits an appellate Court from entertaining an objection based upon alleged misdirection of the jury if the party complaining has not objected at the trial, although the general rule seems to be that objection should be taken at the trial. A practical reason for objecting immediately to a remark by opposing counsel in his address to the jury is that, save in exceptional instances, counsel's address is not taken down by the court reporter, and there is therefore no record of the exact language complained of. The cases on this point are somewhat inconsistent, and each case must rest on its own particular circumstances. *Brenner v. The Toronto Railway* (1907), 15 O.L.R. 195, affirmed 40 S.C.R. 540, quoted and applied.

AN APPEAL by the defendant from the judgment of Harvie Co. Ct. J., of the County Court of the County of Simcoe, entered on the findings of a jury.

7th April 1953. The appeal was heard by PICKUP C.J.O. and HOGG and F. G. MACKEY JJ.A.

*J. P. Bassel*, for the defendant, appellant: [PICKUP C.J.O.: What is the basis of your objection to the address of the plaintiff's counsel to the jury?] Counsel is entitled to submit that certain conclusions follow from the evidence, but he cannot state his own opinion, particularly as to the amount of damages to be awarded. [PICKUP C.J.O.: There would be no objection to his saying, "This is a very serious case and I think you should give a large verdict."] No. [PICKUP C.J.O.: Then your objection is really only to his mention of figures?] Yes. Counsel is in effect giving opinion evidence; he is stating his own opinion as to what the injuries are worth: *Wigmore on Evidence*, 3rd ed. 1940, art. 1806, vol. 6, p. 259. I do not object so much to other expressions of opinion, but it should be clear that he is only stating his own opinion. Nothing must be said to the jury at any stage of the trial as a fact except from the witness-box: *Misner v. Toronto and York Radial R.W. Co.* (1908), 11 O.W.R. 1064; *Watt v. Watt*, [1905] A.C. 115 at 118; *Bradenburg v. Ottawa Electric R.W. Co.* (1909), 19 O.L.R. 34.

The trial judge did not present the defendant's case fairly to the jury: *Rex v. West* (1925), 57 O.L.R. 446, 44 C.C.C. 109; *Bray v. Ford*, [1896] A.C. 44. We were entitled to have the emergency theory put to the jury. The trial judge told the jury that the female plaintiff had lost the use of one arm, while the doctor only said that she had some trouble with it.

The trial was generally so unsatisfactory, on various grounds, that I ask for a new trial: *Dozois et al. v. The Pure Spring Company Limited et al.*, [1935] S.C.R. 319, [1935] 3 D.L.R. 384; *Hesse v. The Saint John Railway Company* (1899), 30 S.C.R. 218.

*B. O'Brien, Q.C.*, for the plaintiffs, respondents: One must look at the whole address to the jury. There was no invitation to them to award damages as if they were the husband of the female plaintiff. Counsel for the plaintiff did not object at the trial to the reference of the plaintiffs' counsel to his own wife. He cannot stand by and let these remarks go unchallenged, and wait for the findings of the jury before objecting. [PICKUP



C.J.O.: Do you mean that an appellant cannot challenge an inflammatory address in the Court of Appeal?] He cannot unless there has been an objection to it at the trial. [HOGG J.A.: That is hardly an absolute rule.] Most cases involving inflammatory addresses are dismissed if no objection has been taken at the trial; if counsel objects at the trial the trial judge, if he thinks fit, can discharge the jury or try in other ways to correct the situation. It is imperative in the case of an inflammatory address that there should be an objection at trial: *Stornberger et al. v. Canadian Pacific R.W. Co.* (1897), 24 O.A.R. 263. [PICKUP C.J.O.: Is there not a distinction between an inflammatory address and a statement by counsel of his own opinion?] It could not result in a miscarriage of justice for counsel to tell the jury, as he did here, that it is impossible to give perfect compensation: *McNeil v. Fingard*, [1945] O.R. 396, [1945] 3 D.L.R. 389.

When one considers all of the evidence of the severe and disabling injuries it is impossible to say that this verdict is so shocking or extravagant as to warrant an assumption that there has been a miscarriage of justice, particularly when it is borne in mind that a doctor examined the female plaintiff on behalf of the defendant, but was not called as a witness at the trial.

Counsel probably should not say that such and such an amount should be given, but there is not really much difference between this statement and saying "I submit", or "Don't you think". It was the duty of the defendant's counsel to object at the time or, if he chose, to try to answer these statements in his own address. It is merely a matter of counsel being over-enthusiastic. The defendant's counsel also erred in saying: "I really truthfully believe that neither party was negligent." Counsel for the plaintiffs merely made a suggestion as to how the jury should decide the question of damages. It was not something outside the evidence. He suggested a figure that he thought fair, with the qualification that the jury did not have to pay any attention if they did not agree with him. [MACKEY J.A.: He said: "I think you should give" a suggested amount. A medical expert could not say that, and I have never heard a judge say such a thing. What is the difference between asking a doctor what he thinks the claim is worth and expressing one's own opinion that it is worth a stated amount?] It was merely

a suggestion. There should be no difference in the rules as to how one should suggest to the jury how they shall answer question 6, and those respecting any other question. [MACKAY J.A.: Is it not a question whether such a remark is conducive to a fair trial? Is the trial not being complicated with unnecessary or irrelevant matters?] The question of damages is not irrelevant. In the final analysis we are trying to get a fair and reasonable assessment of damages. The figure suggested is not extravagantly large in view of the evidence. *Dale v. Toronto R.W. Co.* (1915), 34 O.L.R. 104, 24 D.L.R. 413, shows the importance of objecting at the time. [MACKAY J.A.: For practical reasons the objection should be taken at the time, since addresses to the jury are not ordinarily taken down, and there should be a record if there is to be a subsequent objection.] Yes. The defendant's counsel, in his own address, said: "I don't criticize Mr. Stewart for mentioning amounts", and then he said: "I almost fell off my chair when I heard the amount he mentioned." That is almost as objectionable as what he now attacks.

The theory of the defence was that the female plaintiff was "shamming". If that is suggested the trial judge is entitled to use strong language if his opinion, after seeing the witnesses, is that the suggestion is unjustified: *Dougherty v. Williams et al.* (1872), 32 U.C.Q.B. 215 at 216.

When one examines the whole transcript one cannot say that there was a substantial wrong or miscarriage of justice: *Hutcheon et al. v. Storey*, [1935] S.C.R. 677 at 684-5, [1935] 4 D.L.R. 684.

*J. P. Bassel*, in reply.

*Cur. adv. vult.*

6th May 1953. The judgment of the Court was delivered by

HOGG J.A.:—The action with which this appeal is concerned arises out of a collision between motor vehicles of the respective parties which occurred on the 19th June 1951 on Highway 11 in the district of Muskoka and in which the respondent Agnes Stewart, wife of Jack Stewart, the owner of one of the vehicles, suffered injury. The trial proceeded before His Honour Judge Harvie of the County Court of the County of Simcoe with a jury and the appellant was found wholly responsible for the accident.

Mr. Stewart was awarded the sum of \$2044.77 and his wife the sum of \$13,000.

The principal grounds of appeal to this Court are: (1) The jury were prejudiced against the appellant by certain improper statements made in the course of the address to them of counsel for the respondent. (2) The charge of the trial judge to the jury was not impartial, but tended to prejudice their minds in favour of the female respondent. (3) The damages awarded were excessive. (4) The theory of the defence that the appellant was confronted by an emergency and the law applicable to such circumstances was not brought to the attention of the jury.

I think the purpose of this appeal will be served, in so far as the facts pertaining to the actual accident are concerned, by stating that the motor cars of the appellant and the respondent Stewart, immediately before the mishap, were proceeding in a line, one behind the other, in a northerly direction on the above-mentioned highway. Apparently the first car in the line stopped and the appellant's car, which was fifth in the line of motor vehicles, came into contact with the car of the respondent Stewart, which was immediately ahead of it. The respondent Mrs. Stewart was injured as a result of the accident. No evidence was tendered on behalf of the appellant.

The testimony given by Mrs. Stewart is, in part, to the effect that immediately after the mishap she did not think her injuries were serious as they appeared to consist of bruises only. While she was still at the scene of the accident, in answer to an inquiry if she were hurt, Mrs. Stewart said: "I didn't think very much except I had bruises as far as I knew." She was taken to Orillia and then to her home in Barrie. The next day she was driven some 85 miles to Utterson. Several days after the accident Mrs. Stewart consulted Dr. Gallagher of Huntsville and then saw Dr. Grey of Barrie, who sent her to Dr. E. F. Brooks of Toronto. Subsequently she consulted Dr. George Seymour of Barrie, who sent her to Dr. E. H. Botterell of Toronto. Later she consulted Dr. Wallace Graham and Dr. Allen Walters, both of Toronto. The latter physician had her under observation for five weeks. Mrs. Stewart said that as a result of her injuries she is disabled from doing ordinary household work although she helps with such work at times.



The medical testimony as to the extent of the injuries received by Mrs. Stewart as a result of the accident was confined to that given by Dr. Seymour, who was consulted by Mrs. Stewart some five months after the accident. None of the other physicians was called as a witness at the trial. Dr. Seymour said the objective symptoms were negative, in the sense that he could not observe bruises although there was some tenderness in certain places on her body. The x-ray plates were negative also. Dr. Seymour came to the conclusion that Mrs. Stewart had suffered a severe cerebral concussion which affected her considerably as "it caused a definite change in her personality; she became very forgetful". He said that there would be considerable improvement in Mrs. Stewart's condition and that "it is impossible to say that she will recover completely but she will recover quite a good deal". Dr. Seymour later observed certain objective symptoms as he said Mrs. Stewart had suffered a severe strain to the shoulder and tendon of the arm and that there was scar tissue involved but he thought this disability would slowly improve. He anticipated that future medical care Mrs. Stewart might require would cost \$55.

The appellant has directed the Court's attention to certain passages in the address of counsel for the respondent to the jury which, it is contended, prejudiced the case of the appellant by inviting the jury to measure the quantum of damages to be awarded to Mrs. Stewart upon the basis of what the jurymen would expect if their wives had suffered the injuries received by Mrs. Stewart and the consequences thereof, and that such a statement was an appeal solely to the sympathy and emotion of the jury. Furthermore, complaint was made that counsel had told the jury the sum they should award to Mrs. Stewart as compensation. In other words, as I understand the submission on behalf of the appellant, it is claimed that the jury arrived at their verdict of the amount of damages to be given to Mrs. Stewart on what they were erroneously led to believe was the proper method of appraisal and not on the real measure or rule which the appellant was entitled to have placed before them.

The following passage from the address by counsel for the respondents is the subject of complaint:

"Now you must not give this woman perfect compensation. . . . In the first place you cannot do it because I don't

think any amount of money could. If my wife changed from the cheerful person she is to a person like Mrs. Stewart is to-day—and I say to you if any of your wives manifested the symptoms that have been manifested to you to-day—do you think money would compensate? . . . I say to you that I think she should not receive any less than \$10,000 and I think that, as you should not give her perfect compensation, you should give her not more than \$15,000; but I think it should be closer to \$15,000 than \$10,000. But, if you think I am crazy in that observation, then it is for you—and if you think I am wrong when I say \$10,000 to \$15,000, then, gentlemen, don't be guided by what I feel."

It was said by Mr. Justice Riddell in *Dale v. Toronto R.W. Co.* (1915), 34 O.L.R. 104 at 108, 24 D.L.R. 413, that: "... a jury trial is a fight and not an afternoon tea." He further said that counsel has the right to make an impassioned address on behalf of his client and that in some cases it is his duty to do so, so long as it does not offend in other respects, and the Court should extend considerable latitude, "even to extravagant declamation". But the learned judge qualified this statement by stating that an unfair presentation to the jury should at once be checked and would warrant the trial judge in trying the case alone.

There is truth in the observation made by Mr. Justice Riddell that a jury trial is a fight but, giving this remark its full value, there are certain rules which must be complied with, designed to ensure fair play to the opposing parties, whether in a fight or in a lawsuit. Although rhetoric which verges on the extravagant may be made use of by counsel, there is a general rule which common sense alone dictates, and that is that the language of counsel to a jury should not be of such character as is likely to prejudice the cause of an opponent in the minds of honest men of fair intelligence to such an extent as to work an injustice.

One of the principal questions to be considered by this Court is whether that portion of the address of counsel with regard to which complaint is taken is merely an earnest plea to the jury, although perhaps an exaggerated one, on behalf of the respondent Agnes Stewart, or whether it is prejudicial to the appellant's case to the extent that the jury were influenced by it to reach a verdict without due and just consideration of the evidence.

The rule in England at one time seems to have been, and it may still be the rule there, that the jury should not be informed of the amount claimed by a plaintiff in his statement of claim: *Watt v. Watt*, [1905] A.C. 115. In this Province, there is no objection to the jury being informed of the amount of damages claimed: *Bradenburg v. Ottawa Electric R.W. Co.* (1909), 19 O.L.R. 34. In that case the trial judge, in directing the attention of the jury to what would be a fair and reasonable compensation, mentioned several sums, but he immediately instructed the jury that it was only by way of illustration that any sum was spoken of and that it was not to be considered, and was not even an indication of his own view. Moss C.J.O. said that the Court did not consider this course objectionable for the reason that it seemed plain that the jury were not left with the impression that they had been directed as to the amount they were to fix.

In the present case, no direction was given to the jury by the trial judge that they were not to consider the amount which had been impressed upon them by counsel for Mrs. Stewart as a sum they should award to her. I think it likely that the jury may have been left with the impression, because of the manner in which counsel had urged it upon them, that they should fix the amount of damages she was entitled to receive at between \$10,000 and \$15,000. The compromise of \$13,000 arrived at by the jury, about half way between the amounts stated to them, is some indication that they were so impressed.

The statement to the jury, put in the form of a question, suggesting that they would not consider money to be sufficient compensation if their wives were changed into such a person as Mrs. Stewart appeared to be, was calculated to appeal solely to the emotions of the members of the jury. The measure which the jury are asked to use in fixing the amount of damages to be awarded to Mrs. Stewart is not related to the actual injuries suffered by her or any disability occasioned thereby; it is not based upon the evidence but is a measure in which each jurymen's regard and affection for his wife is the principal element. It is an appeal to the jury to fix the amount of damages upon an appraisalment governed by emotion and not by reason based upon the evidence. This fact, I think, carries the address of counsel



beyond the ordinary and legitimate use of rhetoric which would be allowable in counsel's address to a jury.

In *Pender v. Hamilton Street R.W. Co.* (1917), 12 O.W.N. 262, it was held that certain statements made by counsel for the plaintiff were improper and likely to prejudice the jury and that this fact was sufficient ground to order a new trial. Meredith C.J.C.P. said that through over-zeal a fair trial had been prevented. He also gave the following wise and salutary admonition: "... restraint upon extravagance of expression, in the conduct of cases . . . whilst aiding in the due administration of justice, does not in any way tend to the weakening of a party's cause, in the long run." The remarks of Osler J.A. in the earlier case of *Misner v. Toronto and York Radial R.W. Co.* (1908), 11 O.W.R. 1064, are also directed to the point now under discussion.

Turning now to the ground of appeal based upon the claim that statements were made to the jury by the learned trial judge in his charge to them which tended to prejudice their minds in favour of the respondents, I think it is not amiss to restate a basic principle which should govern a judge's charge to a jury as it was expressed by Duff J. (afterwards C.J.C.) in *The Montreal Tramways Company v. Séguin* (1916), 52 S.C.R. 644 at 650, 28 D.L.R. 494. He said: "The learned trial judge was entitled to express his opinion on the point so long as he did not lead the jury to think that he was giving them a direction it would be their duty to follow".

In the present case, after forcibly commenting upon what a "strong, vigorous, virile"—to use the words of the learned trial judge—woman Mrs. Stewart was before the accident, and after reference to the disabilities suffered by her as a result of the accident, the jury were told that her life "has been virtually ruined", that she was a "nervous wreck—lost her control". Evidence brought out by the defence on the cross-examination of Mrs. Stewart to the effect that she was able to do some household work after the accident was referred to as being "elicited in a feeble sort of way".

I think that the description of the condition of Mrs. Stewart as being virtually ruined for life, in the sense such language would be understood by ordinary men, is not an inference that can be reasonably drawn from Mrs. Stewart's evidence and from that of Dr. Seymour, taken as a whole.

I think it is an over-drawn picture which may have led the jury to think it was their duty to accept it and which might, and I think did, influence them in some part in awarding \$13,000 damages to Mrs. Stewart, notwithstanding the fact that the learned trial judge did instruct the jury that they were entitled to reject any opinion he might express and that they were the sole judges of the facts.

In *Johnston v. Great Western Railway Company*, [1904] 2 K.B. 250, it was held that the verdict of a jury may be set aside and a new trial granted if the Court, without imputing perversity to the jury, comes to the conclusion, from the amount of the damages and other circumstances, that the jury must have taken into consideration matters which they ought not to have considered, or applied a wrong measure of damages.

A ground of appeal in that case was that the trial judge had omitted to give the jury accurate direction as to the principle on which to assess compensation. Another ground of appeal was that the damages awarded were excessive. Vaughan Williams L.J. said at p. 256:

“ . . . if the Court, from the circumstances of the case and the amount of the damages, can draw the inference that the jury must have applied a wrong measure of damage in contravention of the direction of the judge, the Court may order a new trial. . . . So in the present case, if I could come to the conclusion that, looking at the figures, the jury must have taken into account some head or some measure of damage not properly involved in or applied to the plaintiff's claim, I should say that we ought to order a new trial.”

And at p. 258: “In any case in which you are able to draw the inference that the jury either included a topic which ought not to have been included, or measured the damages by a measure which ought not to have been applied, I think there ought to be a new trial. But I am not prepared to say that that is so in the present case.”

The rule laid down in *Johnston v. Great Western Railway Company* as to the measure of damages was referred to with approval in this Court in *Sentinel Review Co. Ltd. v. Robinson*, 61 O.L.R. 62, [1927] 4 D.L.R. 232. The judgment was reversed in the Supreme Court of Canada, [1928] S.C.R. 358, [1928] 3 D.L.R. 97, but on other grounds.

In the appeal we are now considering, I think that the appreciation of the evidence on the part of the jury may have been influenced to the prejudice of the appellant's case not only by the statements made to them by counsel, to which I have made reference, but also by the view, to which I have alluded, of the evidence put before the jury with very considerable force by the learned trial judge.

Objection was not taken at the trial by counsel for the appellant to the remarks by counsel for the respondents, to which exception is now taken, although exception was taken to the judge's charge. There is no rule which absolutely prohibits an appellate Court from entertaining an objection based upon alleged misdirection of the jury, when the party complaining has omitted to take such objection at the trial, although the general rule seems to be that objection is to be taken at the trial. The decisions are somewhat inconsistent. In *Sornberger et al. v. Canadian Pacific R.W. Co.* (1897), 24 O.A.R. 263, it was held that where the complaint is made that counsel at the trial has swayed the minds of the jury by improper remarks, objection must be taken at once to such remarks.

In the later case of *Gage v. Reid* (1917), 38 O.L.R. 514, 34 D.L.R. 46, one of the grounds of appeal was that the minds of the jury had been adversely affected by remarks of counsel. No objection was taken at the time, but this Court granted a new trial because injustice had resulted.

In *Ristow v. Wetstein et al.*, [1934] S.C.R. 128, [1934] 1 D.L.R. 787, notwithstanding the fact that no objection was taken to the charge to the jury, a new trial was directed on the ground of miscarriage because the plaintiff's case was not properly submitted to the jury.

The judgments in *Wilson et al. v. United Counties Bank, Limited*, [1920] A.C. 102, and *Thompson v. Fraser Companies, Limited*, [1930] S.C.R. 109, [1929] 3 D.L.R. 778, hold that objection to a misdirection should be taken at the trial but nevertheless it is within the competence of an appellate Court to grant a new trial. A reason of a practical nature for holding that objection should be taken at once, at the trial, is that the address of counsel to the jury, save in exceptional instances, is not taken down by the court reporter and there is therefore no record of the exact language regarding which complaint is made.



Each case must, however, rest on its own peculiar circumstances, and as was said by Osler J.A. in *Brenner v. The Toronto Railway* (1907), 15 O.L.R. 195 at 198, 8 C.R.C. 100, affirmed 40 S.C.R. 540, 8 C.R.C. 108: “. . . misdirection sometimes results in a mistrial or in a failure to guide the jury, in dealing with the essentials of the case, and when that happens and a substantial wrong or miscarriage is occasioned thereby, I have no doubt, that the Court can and ought to interfere even though no objection was taken to the charge.”

I am of the opinion that there should be a new trial directed only to the assessment of damages. I think the words of King J. in the Supreme Court of Canada in *Hesse v. The St. John Railway Company* (1899), 30 S.C.R. 218 at 239, may be aptly applied to the present case: “too many disturbing and conflicting considerations got into the case”. The same conception was expressed in the same Court in *Dozois et al. v. The Pure Spring Company Limited et al.*, [1935] S.C.R. 319, [1935] 3 D.L.R. 384, where Duff C.J.C. said that: “. . . the matter, which the jury had to consider [was] not brought so clearly and so fairly to the minds of the jury as to justify them in allowing the verdict to stand”. The judgment of this Court in *Temple v. Ottawa Drug Company Limited and Walsh*, [1946] O.W.N. 295, is in point.

I do not think the objection that the question of emergency was not properly brought to the attention of the jury can be sustained.

There should be a new trial limited to the assessment of damages. The finding of the jury as to liability is not interfered with. The costs of the appeal should be to the appellant, the costs of the former trial to be to the respondents and those of the new trial to be in the disposition of the judge presiding at the new trial.

*New trial ordered as to damages.*

*Solicitors for the plaintiffs, respondents: Stewart & Esten, Barrie.*

*Solicitors for the defendant, appellant: Hughes, Agar, Amys & Steen, Toronto.*

[McRUER C.J.H.C.]

**Lippman et al. v. Lee Yick et al.**

*Landlord and Tenant—Forfeiture for Breach of Covenant—Covenant not to Sublet—Ownership of Chattels—Sufficiency of Landlord's Notice Calling on Tenant to Remedy Breaches—Relief against Forfeiture—The Landlord and Tenant Act, R.S.O. 1950, c. 199, ss. 18, 19.*

The executor of the lessee of a restaurant, wishing to be relieved of the burden of management, entered into an agreement with three employees, designated as "managers", whereby they were to have the right to carry on the business and determine matters of policy, but the executor was to have a right of access to the property and to the books and records of the business. The agreement further provided for the sale to the "managers" of the physical assets of the business and all the executor's right, title and interest therein, together with the goodwill, to be transferred to them on completion of payment of the purchase-price.

*Held:* (1) This agreement did not constitute a breach of the covenant in the lease against subletting without the consent of the lessor. Since the executor retained a right of access, and in view of the other terms of the agreement, it should be construed as giving the "managers" no more than a licence, and did not confer on them any estate in the land, or give the executor a right to distrain for non-payment of the instalments owing.

(2) Even if there had been a breach of this covenant, the facts were such that it should be held that the executrices of the lessor had waived any right of forfeiture consequent upon the breach.

(3) The agreement did, however, constitute a breach of the lessee's covenant "that he is the sole owner of all goods and chattels which are to be brought upon the said premises." This should be construed as a continuing covenant, meaning that the lessee or his estate would, throughout the term of the lease, be the sole owner of all goods and chattels brought on the premises from time to time. Although the executor retained the legal title under the agreement until full payment of the purchase-price, he was not the "sole owner" within the meaning of the covenant.

(4) The executor had acted throughout in the utmost good faith, and the case was a very proper one for relief against forfeiture. He should be given a reasonable time in which to place the affairs of the estate in such a condition that there would be no continuing breach of the covenant in respect of ownership of the chattels.

Review of authorities.

AN ACTION on a lease. The plaintiffs were the executrices of Isaac Zacks, deceased, the lessor, and the defendants were Lee Yick, executor of the estate of William T. Lee, deceased, the lessee, and Wing Lee, Lee Fook and Henry Wongett, the "managers" under an agreement discussed in the reasons for judgment.

18th February 1953. The action was tried by McRUER C.J.H.C. without a jury at Kingston.

*K. G. Morden, Q.C., and W. G. Cunningham, for the plaintiffs.*

*H. L. Cartwright, for the defendants.*

6th May 1953. McRUER C.J.H.C.:—On the 1st May 1947 the late Isaac Zacks (to whom I shall refer as "Zacks") entered

into a lease pursuant to The Short Forms of Leases Act, now R.S.O. 1950, c. 361, with the late William T. Lee (to whom I shall refer as "Lee"), a restaurant operator, whereby he leased part of 271-273 Princess Street in the city of Kingston to be used for the purposes of a restaurant, for a term of 13 years to be computed from the 1st May 1947, yielding a rent yearly and every year during the term in the amount of \$200 per month payable on the first day of each and every month until the 1st May 1950, and thereafter of \$275 per month until the 30th April 1960. The lessee covenanted to pay taxes, except for local improvements, water-rates, charges for gas, electricity and telephone, and to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

The lease contained the following provisions:

"And will not assign or sub-let without leave. And such consent may, notwithstanding the provisions of Section 22 of the Landlord and Tenant Act of Ontario, be arbitrarily refused by the Lessor in his sole and uncontrolled discretion. . . .

"The Lessee covenants that he is the sole owner of all goods and chattels which are to be brought upon the said premises, and that they are free from any mortgage, lien or other charge. The Lessee covenants with the Lessor that, notwithstanding anything in Section 29 of Chapter 219 of the Revised Statutes of Ontario, 1937, or in any other section of the said Act, or in any other Act, none of the goods or chattels of the Lessee on the premises at any time during the continuance of the term hereby granted shall be exempt from levy by distress for rent in arrear by the Lessee, the Lessee waiving, as he hereby does, every benefit that might have accrued to him under the said sections of the said Acts, or any amendments thereof, but for the above covenants. . . .

"Proviso for re-entry by the Lessor on non-payment of rent, or non-performance of covenants or seizure or forfeiture of the said term for any of the causes aforesaid. . . .

"And the said Lessee is to have the first chance to purchase the said property herein described during the term of this lease.

"Provided that in the event of any proposed building extension, or alteration, costing more than \$1500.00, fifteen hundred dollars, such extension or alteration shall not be commenced without the consent in writing of the said Lessor."



On the 20th May 1947 the lessor and the lessee entered into a supplementary agreement reciting the lease dated the 1st May 1947, which provided that the reference to extensions or alterations contained in the lease be cancelled and the following clause substituted: "Provided that no building extension or alteration shall be undertaken or commenced without the consent in writing of the Lessor."

The agreement further provided that "reasonable wear and tear" in the lease be struck out and cancelled. There are other provisions that have no bearing on the matter in issue.

On the 29th July 1947 the parties entered into a further agreement reciting the two previous agreements and providing that

(1) the term of the lease was extended until the 1st May 1965;

(2) during the extended period of the lease, namely, 5 years, the rental should be \$375 per month payable in advance; and

(3) "All extensions and additions to the original building No. 271 Princess Street, undertaken since the 1st day of May, 1947, and all improvements and additions affixed or attached to any part of the structure of the building and its extensions shall become and remain the property of the Lessor."

A fire occurred in 1947 after the lease was entered into but when the evidence does not disclose. One would assume from the documents that it was before the extension dated 29th July. The insurance money received by the lessor was applied in reconstruction of the building and according to the evidence the lessee invested between \$38,000 and \$39,000 in the reconstruction and \$43,000 in equipment for the restaurant, including refrigerators, soda-fountains, and so forth.

The lessee died on the 6th January 1949, leaving as his executor Lee Yick, who is now an elderly man and wishes to be relieved of the responsibility of carrying on the restaurant for the estate.

On the 7th July 1952 Mr. Yick's solicitors wrote to the executors of the Zacks estate stating that Mr. Yick was negotiating for a sale of the business, which was known as the "Roy York Cafe", and that the sale would involve the transfer of the lease. The proposed purchasers were said to be Wong Fook Chow, Wing Lee and Henry Wonggett, who were all employed in the restaurant. The letter stated that the transfer of the

lease was merely a formality as in any case Mr. Wongett was to be appointed administrator of the Lee estate in place of Lee Yick, but by consenting to the transfer of the lease the executors of the lessor would have the additional security of Wong Fook Chow and Wing Lee who had been managing the cafe on behalf of Lee Yick for some time.

On the 25th July Mr. Millman, an accountant and the husband of one of the executrices of the estate of Isaac Zacks, replied on behalf of the executrices, stating that they had instructed him to say that at the present time it was not their wish to consent to any transfer of the lease. The letter concluded:

"They have stated that while they appreciate the difficulties involved in the Lee Estate, no commitment can be made at this time by the executors of the Zacks Estate."

On the 7th August 1952 Lee Yick, as executor of the estate of William T. Lee, entered into an agreement with Wing Lee, Lee Fook and Henry Wongett, who were referred to in the agreement as "the Managers" (and to whom I shall refer as the "managers"). This agreement recited that Lee Yick as "the Vendor" in his capacity as executor of the estate of the late William T. Lee was desirous of being relieved of the management of the cafe, and that the executor had agreed to sell the physical assets of the business to the "managers" and to give the "managers" a licence to carry on the business in the premises rented by the executor from the late Isaac Zacks. The agreement purported to be in consideration of the sum of \$35,000 and contained these clauses:

"1. The Executor agrees to sell and the managers agree to purchase the physical assets of the business known as the Roy York Cafe at the price of \$35,000 and the further considerations hereinafter set out.

"2. The managers will pay the executor the sum of \$9000 cash (on which amount the amount now owing by the estate of W. T. Lee to Wing Lee shall be credited) and by giving a chattel mortgage to the executor for \$26,000 payable \$300.00 monthly for 6 months and \$400.00 monthly hereafter."

The agreement gives the "managers" the right to carry on the business and to determine all matters of policy, but the executor is to have the right of access to the property and to the books and records of the business and in the event that the

"managers" are unable to carry on the business at a profit the executor has the option of terminating the agreement.

The agreement further provides that upon completion of the payments all the right, title and interest of the executor in the business, together with the goodwill, shall be transferred to the "managers" and that the executor shall at that time use his best endeavours to obtain the consent of the landlord to an assignment of the lease and will in any event continue the licence to the "managers" to occupy the premises for the duration of the lease or any extension thereof which might be granted by the landlord to the executor. Real estate taxes, business taxes and insurance are to be adjusted as of the 11th August 1952, and the executor is required to pay all debts contracted on account of the business prior to that date, including the final payment to the Industrial Acceptance Corporation and repairs to the air-conditioning unit, and the "managers" are to pay an account for certain repairs falling due on or after the 11th August 1952.

The agreement contains an overriding provision that in the event that it cannot be carried out because of a successful objection by a creditor, beneficiary or the landlord of the premises, the executor will refund to the "managers" any moneys paid by them under the agreement, but in such event the executor will be entitled to any profits arising out of the restaurant business during the period of the "managers'" operation after an allowance for a management fee.

On the 14th August Mr. Cartwright, acting for the Lee estate, sent a copy of this agreement to Mr. Millman and asked that the executrices of the Zacks estate reconsider their refusal to assign the lease. The concluding sentence of the letter reads:

"As you will see the agreement grants a license to the three managers to use the restaurant and the only substantial difference between this license and an outright assignment would be that the rent would be paid directly by the managers rather than through Lee Yick."

On the 2nd September Lee Yick tendered a cheque to Mr. Millman for \$275, being the rent for the month of September. This cheque, payable to "I. Zacks Estate" was accepted and endorsed for deposit to the credit of the estate and deposited in the Bank of Nova Scotia accordingly.

On the 12th September the executrices of the estate of Isaac Zacks forwarded by registered letter a notice to Lee Yick



stating that the goods and chattels of the estate of W. T. Lee situated on the premises had been seized by the sheriff under an execution levied by the Swift Canadian Company Limited and that the estate of Isaac Zacks had been advised that an order had been granted by His Honour Judge Reynolds on the application of Simmons Bros. Limited to sell the interest of the estate of William T. Lee in the lease; that the aforementioned actions were breaches of the covenants contained in the lease, and the notice called upon Mr. Yick to remedy these breaches on or before the 12th October 1952, and stated that on his failing to do so the balance of the term would be forfeited.

On the 15th September the executrices of the estate of Isaac Zacks sent to Mr. Yick by registered mail a notice advising him that the taxes which were due on the 21st August 1952 had not been paid and calling upon him to remedy this breach of covenant by the 12th October 1952, or the balance of the term would be forfeited.

These alleged breaches of the covenants in the lease were remedied. However, in a letter dated the 6th October 1952, advising that the breaches of covenant had been remedied, Mr. Cartwright concluded with the following postscript: "In any event the management agreement which we forwarded to you has the effect of vesting the chattels for the managers so that the execution by the Sheriff is ineffective."

On the 20th October 1952 the executrices of the Zacks estate, through their solicitors, sent a notice to Mr. Yick as follows:

"The executrices of the Estate of Isaac Zacks, the Lessor of the lands and premises at 271-3 Princess Street, in the City of Kingston, have learned of the following breaches on your part of covenants contained in the lease dated the 1st day of May 1947, as amended by agreements dated the 20th day of May 1947, and the 29th day of July 1947, made between Isaac Zacks as Lessor and William T. Lee as Lessee.

"1. You have sub-let the said premises to Wing Lee, Lee Fook and Henry Wongett without the leave of the Lessors.

"2. You have sold the goods and chattels on the said premises to the said Wing Lee, Lee Fook and Henry Wongett and you are no longer the owner of the said goods and chattels.

"Notice of these breaches of the covenants in the said lease is given to you pursuant to Sec. 18(2) of the Landlord and Ten-

ant Act, R.S.O. 1950, Chapter 199, so that you may consider your position in the matter.

"We are returning herewith your cheque for \$275.00 presumably for rent which the Lessors will not accept as they take the position the said lease is forfeited."

In reply to this letter Mr. Cartwright wrote to the solicitors for the Zacks estate stating that the management agreement was not intended to be a subletting, and if it was the contention on behalf of the Zacks estate that it was a subletting, the parties were willing to amend it to carry out the intention that it should only relieve Mr. Lee Yick of the burden of management. The letter went on to say that if this could not be done Mr. Cartwright would have to advise Mr. Yick to pass his accounts and have a new administrator appointed. The letter proceeded:

"You complain that the sale of the chattels to Wing Lee et al. is a breach of the lease. Will you please point out the clause which you complain has been breached. If you are correct in your contention we have received directions from the purchasers to enter into a supplementary agreement which would fully protect the landlord. They are, for instance, willing to agree that the chattels shall be treated as chattels of Lee Yick for the balance of the lease as between them and the landlord. We call to your attention that these chattels have always been covered by a conditional sales agreement to the Industrial Acceptance Corporation to the knowledge of the landlord and that the title has never passed to Willie T. Lee or his executor. Under the present arrangements as soon as the Industrial Acceptance Corporation is paid the title would pass to the executor and would be retained by him under his chattel mortgage so that the landlord would be even better protected than he has been in the past.

"These breaches that you complain of, if they are breaches, are capable of remedy and we propose to remedy them if your objections are valid. Will you please let us hear from you in this matter at your earliest convenience. In the meantime we are holding the cheque for rent and will forward it to you upon request."

In reply to this letter the solicitors for the Zacks estate wrote on the 24th October stating:

"1. It is our contention that the agreement of August 7th, 1952, amounts to a sub-lease of the premises in question. Under the authorities, the act of sub-letting is not capable of remedy.

“2. The lease provides as follows:

“The lessee covenants that he is the sole owner of all goods and chattels which are to be brought upon the said premises, and that they are free from any mortgage, lien or other charge.’

“It is apparent on the face of the agreement and your letter of October 6th to the Executors that the lessee is no longer the owner of the goods and chattels on the premises.”

On the 29th October the executrices of the Zacks estate served notice on Lee Yick demanding that he give up possession of the premises on the ground that the lease had been determined by breach of covenants in the lease.

On the 31st October Mr. Cartwright sent to the solicitors for the Zacks estate a cheque for \$275, being the rent for the month of November.

On the 3rd November this cheque was returned with the statement: “As this lease has been forfeited, we are returning the cheque herewith.”

On the 4th November 1952 the solicitors for the Zacks estate gave notice to Wing Lee, Lee Fook and Henry Wongett demanding possession of the premises.

The writ in this action was issued on the 10th November 1952.

The plaintiffs claim a declaration that the lease entered into between Zacks and Lee has been forfeited, possession of the leased premises, and mesne profits or damages in the alternative.

In the pleading the claim that the lease has been forfeited is based on the following alleged breaches of covenant, (a) that Lee covenanted and agreed not to sublet the premises without leave; and (b) that Lee covenanted that he was “the sole owner of all goods and chattels which are to be brought upon the said premises, and that they are free from any mortgage, lien or other charge”. The allegation in the pleading is that in breach of these covenants Lee sublet the premises and sold all the goods and chattels thereon to the sublessees.

The defendants plead waiver of the forfeiture and, although not expressly doing so, in substance ask for relief against the forfeiture, if there was forfeiture that can be relieved against. In any event, as the case was argued before me on the basis that the defendants were claiming relief against forfeiture I give



leave to amend the statement of defence to make such claim in express words.

Subject to what I shall say about waiver of forfeiture, if the executor of Lee sublet the premises the plaintiff is entitled to the relief asked, as forfeiture for breach of covenant not to sublet, not being one coming within the exceptions mentioned in s. 19(7) of The Landlord and Tenant Act, R.S.O. 1950, c. 199, cannot be relieved against.

In argument certain defences were raised as to the sufficiency of the notice to quit, which I shall discuss later.

One is stating old and modern law when one says that the Courts have leaned against forfeiture and held a strict hand over conditions for defeating leases. It goes as far back as *Goodright d. Walter v. Davids* (1778), 2 Cowp. 804 at 805, 98 E.R. 1371, a judgment of Lord Mansfield C.J. and *Crusoe d. Blencowe v. Bugby* (1771), 2 W. Bl. 766 at 767, 96 E.R. 448; see also per Joyce J. in *Grove v. Portal*, [1902] 1 Ch. 727 at 731.

It is first to be observed that the lease in question does not contain a covenant not to part with possession of the premises or against change of occupancy as was contained in the leases in many of the cases cited by counsel on the argument and those cases are all to be read in the light of the particular covenants contained in the leases which were under consideration.

The first principles of law to be applied to the facts of this case are set out with great clarity in the judgment of Romer J. in *Jackson v. Simons*, [1923] 1 Ch. 373.

At p. 382 he said: "It is well settled that a covenant not to assign the demised premises is not broken by underletting, that a covenant not to assign or underlet is not broken by a mere declaration of trust of the lessee's interest or by a parting with the possession of the demised premises."

And after discussing the covenants against alienation the learned judge went on to say at p. 383:

"Farther, if the landlord has a covenant against both assigning and underletting, the tenant might by an agreement, neither assigning, nor underletting, put another person in possession of the premises; and parting with the possession in that manner would not be a breach of those covenants. . . .

"A covenant against assigning the demised premises, a covenant against underletting the demised premises, and a covenant against parting with the possession of the demised premises are

therefore three distinct covenants, though all belonging to the same class, and if there be any other method of disposing of the demised premises that would not amount to an assignment, underletting, or parting with possession, a covenant not to dispose of the demised premises would be another and a different covenant of the same class, though including, perhaps, all three of the covenants already mentioned. In the same way, a covenant against sharing the possession is another distinct covenant, for, as already pointed out, a covenant against parting with the possession of the demised premises is not broken by sharing the possession with another."

A lease, an assignment of a lease or an underlease is not only a contract between the parties but it necessarily creates an interest or an estate in land (2 Bl. Com. 317); and the right to distrain is incident of the common right of every rent service: per Meredith C.J. in *Harpelle v. Carroll* (1896), 27 O.R. 240 at 248. In construing the document before me it is not a matter of words but of substance: per Lord Davey in *Glenwood Lumber Company Limited v. Phillips*, [1904] A.C. 405 at 408; and even where words are used which are particularly appropriate to a lease, the Court may nevertheless, on consideration of the agreement as a whole, conclude that it is a licence: *Daly v. Edwardes* (1900), 83 L.T. 548, affirmed *sub nom. Edwardes v. Barrington* (1901), 85 L.T. 650; *Town of Brockville v. Dobbie and Ritchie*, 64 O.L.R. 75, [1929] 3 D.L.R. 583. In the former case in the Court of Appeal particular reference may be made to the judgments of Lord Alverstone C.J. at p. 550 and Vaughan Williams L.J. at p. 551. Lifewise, parties cannot turn a tenancy into a licence merely by calling it one: per Denning L.J. in *Errington v. Errington and Woods*, [1952] 1 K.B. 290 at 298, [1952] 1 All E.R. 149.

Counsel for the plaintiffs places his case that a sub-tenancy was created under the agreement on the wording of art. 2 in Williams, *Canadian Law of Landlord and Tenant*, 2nd ed. 1934, p. 4, which reads as follows: "Where the substance of the agreement between the parties is that the grantee is not to have the right to the exclusive possession of the premises but only the right to use them, then, no matter what the words used, the grant will operate as a license and not as a lease".

Counsel also relies on the judgment of Lord Davey in *Glenwood Lumber Company, Limited v. Phillips*, *supra*, at p. 408,

where he said: "If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

On behalf of the plaintiffs it was contended that the crucial test was whether the agreement in question gave the "managers" an exclusive right of occupation or possession of the lands, and counsel argued that where exclusive possession or occupancy is given an estate in land is created and hence if I hold that the "managers" are given exclusive possession or occupancy there has been a subletting. I do not think that the quotation from Williams, or the passage from the judgment of Lord Davey, was intended to make such a sweeping statement of the law as is contended for by counsel, and I think such a view is not consistent with recent decisions. Lord Davey was clearly making a statement of law applicable to the facts of the case before the Judicial Committee.

Three recent cases in England have done much to clarify some statements in previous decisions which would lend foundation to the argument presented by counsel for the plaintiffs, and these decisions are consistent with the decision in *Town of Brockville v. Dobbie and Ritchie* that has been already referred to.

In *Booker v. Palmer*, [1942] 2 All E.R. 674, Lord Greene M.R., giving the judgment of the Court of Appeal, held that where the defendant had been given the right of occupancy of a cottage rent-free for the duration of the war the relationship of landlord and tenant was not created. At p. 676 he said: "Whether or not parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created in the tenant and certain mutual obligations arise by implication of law, must in the last resort be a question of intention."

The judgment of Denning L.J. in *Errington v. Errington and Woods*, *supra*, is a most useful contribution to the law on the subject of how far an agreement for exclusive possession is to be taken to create the relationship of landlord and tenant. At pp. 296 and 298 the learned lord justice said:

"The difference between a tenancy and a licence is, therefore, that, in a tenancy, an interest passes in the land, whereas, in a



licence, it does not. In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant, albeit only a tenant at will (see *Doe v. Chamberlaine* (1839), 5 M. & W. 14, 16 [151 E.R. 7] and *Lynes v. Snaith*, [1899] 1 Q.B. 486) whereas if he had not exclusive possession he was only a licensee: *Peakin v. Peakin*, [1895] 2 I.R. 359. This test has, however, often given rise to misgivings because it may not correspond to realities . . . Now, after the lapse of a hundred years, it has become clear that the view of Lord Abinger was right. The test of exclusive possession is by no means decisive. . . .

“The result of all these cases is that, although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only. In view of these recent cases I doubt whether *Lynes v. Snaith*, and the case of the gamekeeper referred to therein, would be decided the same way today.”

In *Cobb et al. v. Lane*, [1952] 1 All E.R. 1199, Somervell L.J. at p. 1201 considered again the contention that if you find exclusive possession given you must find a tenancy and reviewed the cases and followed *Booker v. Palmer* and *Errington v. Errington and Woods*. At p. 1202 Denning L.J. said:

“I endeavoured to collect the cases in *Errington v. Errington* and since that case was decided we have added one more. Only last week we had a case where an employer had bought a house and allowed his servant to live there simply on the servant’s paying interest on the purchase price. It was held that the servant was not a service occupier nor a service tenant, but only a licensee: see *Gorham (Contractors), Ltd. v. Field* (unreported). The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land? It seems to me that the judge has so found. The defendant had only a personal privi-

lege with no interest in the land, which he could assign or sub-let, and he could not part with the possession to another."

This brings me to an examination of the document that is alleged to be an underlease from Lee to the so-called "managers".

It is not argued or alleged that there was an assignment of the lease of the premises. To effect an assignment of the lease it would have to create the relationship of landlord and tenant between the Zacks estate and the assignee. There is nothing in the form or substance of the document that purports to create such a relationship. The more difficult question is—On its true construction is it an underlease or a mere licence? If it is the former, one must find the intention to create the relationship of landlord and tenant between the Lee estate and the "managers" and that the sums payable under the agreement are rent service and the Lee estate is given the right to distrain in default of payment thereof.

I am not troubled with words appropriate to a lease such as troubled the Court in *Daly v. Edwardes*, *supra*, and *Town of Brockville v. Dobbie and Ritchie*, *supra*. There are no words of demise and the draftsman has carefully avoided giving the agreement any appearance of being a sublease. This, however, would not prevent me from finding that it is a sublease if I should conclude that in substance it is.

The agreement purports to be nothing more than a licence to occupy the premises and to carry on the business on the premises. The obligation imposed on the "managers" is to pay \$35,000 for the physical assets by paying \$9,000 in cash and giving a chattel mortgage for \$26,000 payable \$300 per month for six months and \$400 per month thereafter. The "managers" are not given exclusive possession of the property and their right of management is limited by the executor's right of access at all times to the property and to the books and records, and in the event that the "managers" are unable to carry on the business at a profit the executor has the right to terminate the agreement.

When the payments have all been made the executor undertakes to transfer all his right, title and interest in the restaurant business and the goodwill and to use his best endeavours to secure an assignment of the lease, but in any event he will continue the licence to occupy the premises for the duration of the lease. The agreement, however, is subject to the overriding provision that I have referred to, *i.e.*, if its terms cannot be

carried out by reason of the successful objection of the landlord, the executor will refund any moneys paid by the "managers" under the agreement and in that event the executor is to be entitled to any profits arising out of the business after making an allowance for a management fee.

On these facts does the agreement confer on the "managers" an estate in land or is the executor of Lee's estate given a right to distrain for non-payment of the instalments due under it? I think the answer to both questions is clearly in the negative. In substance, the agreement creates mere contractual rights of purchase and sale of the physical assets of the business and gives a right to occupy the premises subject to a right of access to the premises and the books of the business and also subject to the business being carried on at a profit or any valid objection being raised by the landlord. I cannot find that the essential element of the relationship of landlord and tenant between the Lee estate and the "managers" has been created. That being so, and there being no covenant in the lease not to part with the possession of the property or any part thereof, or to share the possession with any other person, there are no facts that would warrant me in finding that the plaintiffs can succeed on the ground that there has been a forfeiture on the first ground claimed.

Even if I am wrong in holding that there was not a forfeiture of the lease on the ground of subletting I find that the plaintiffs have waived any forfeiture based on the covenant not to sublet. This I shall deal with later.

The claim for forfeiture by reason of breach of covenant arising out of the sale of the chattels poses another problem. I think the proper construction of the relevant clauses in the lease is that the lessee covenanted that he would continue to be the sole owner of the goods and chattels brought on the premises from time to time, but this covenant must be given a reasonable construction. The business was a restaurant business and part of its business was to bring goods on to the premises and sell them, but it was not part of the business to part with the ownership of the chattels on the premises without which the business could not be carried on. It was stated at the trial that these chattels had been subject to a lien to the Industrial Acceptance Corporation throughout the term of the lease, or at least since the fire and reconstruction had occurred. It may well be that



Zacks in these circumstances was willing to waive any breach of the covenant in order that a prosperous business might be carried on. In such case if there was default in payment of the rent the landlord might protect himself accordingly, but it is quite another thing when the tenant agrees to sell all the chattels on the premises to third parties, retaining as his security for the unpaid balance a chattel mortgage. Although the property in the chattels remains in the mortgagee until the chattel mortgage is paid off, I do not think the mortgagee can be said to be the sole owner of the chattels within the meaning of the agreement. When the payments have been made the ownership in the chattels will unquestionably pass to the "managers" and the mortgagee will have no further interest in them.

I therefore find there has been a breach of the relevant covenant. But the breach of this covenant is not one that comes within s. 19(7) of The Landlord and Tenant Act, but does come within ss. 18(2) and 19(1). The tenant in this case is in a difficult position. Zacks and Lee appear to have been on friendly terms during their lives. A fire occurred shortly after the lease was entered into. Both parties spent large sums of money on repairing the building and Lee also spent a large sum for fixtures. Within three months after the date of the first lease a supplementary lease was entered into for an additional five years at an increased rental for the added term. Both lessor and lessee died. I cannot find that the executor of the Lee estate has deliberately committed a breach of any covenant of the lease. On the other hand, I think he has been careful to avoid doing so and that any breach that he has committed is one that may be remedied. The correspondence passing between the solicitors would indicate that the executor of the Lee estate was trying to avoid doing anything that would render the lease liable to forfeiture, while the facts at least suggest a desire on the part of those managing the Zacks estate to bring the lease to an early end, in which case they would gain the advantage of all the investment that Lee had made in the building and permanent fixtures.

The notice dated the 20th October did not require the tenant to remedy the breach of the covenant I am now considering or to make compensation in money to the satisfaction of the landlord as is required by s. 18(2) of The Landlord and Tenant Act.

It is argued on behalf of the defendants that the plaintiffs having accepted the rent for the month of September, after having been furnished with a copy of the agreement between the Lee estate and the "managers", and having on the 12th September exercised their rights under the lease to serve notice that unless certain breaches of covenants were remedied before the 12th October the balance of the term of the lease would be forfeited, and again having served notice on the 15th September to the like effect, waived any forfeiture of the lease arising out of the agreement with the "managers".

It has always been held that if a landlord accepts rent after notice of forfeiture he thereby acknowledges that the lease is continuing: per Lord Goddard C.J. in *Clarke v. Grant et al.*, [1950] 1 K.B. 104 at 105, [1949] 1 All E.R. 768. The origin of this principle of law goes back as far as Coke; see Lit., sec. 341 and Coke's commentary upon it, 211b. The law laid down by Mansfield C.J. in *Goodright d. Walter v. Davids, supra*, has never been departed from.

In *Jardine et al. v. Attorney-General for Newfoundland et al.*, [1932] A.C. 275 at 289, Lord Russell of Killowen said: "In the case of a forfeiture clause, acceptance of rent after a known breach of a covenant or condition is not waiver of the covenant or condition or some part thereof, *but waiver of the right to forfeit which has arisen from the breach*; and their Lordships feel a difficulty (in the absence of any special circumstances) in attributing to the receipt of rent after notice of breach of a condition, any effect short of a complete waiver of the right to forfeit by reason of that breach." (The italics are mine.)

In *Straus Land Corporation Limited v. International Hotel Windsor Limited* (1919), 45 O.L.R. 145, 48 D.L.R. 519, Riddell J., giving the judgment of the Court of Appeal said at p. 149: "There has never been any doubt that a forfeiture does not act *ipso facto*, but can be waived, and that an unequivocal act which shews a claim by the landlord of the existence of a tenancy, after the act complained of, operates as such a waiver—at least if such act be done before an unequivocal claim of forfeiture."

In *The King v. Paulson et al.*, [1921] 1 A.C. 271 at 283, 54 D.L.R. 331, [1920] 3 W.W.R. 372, Lord Atkinson quotes from the judgment of Baron Bramwell in *Croft v. Lumley* (1857), 6 H.L. Cas. 672 at 706, 10 E.R. 1459, as follows: "Now this question supposes there was a breach of covenant giving a right of re-entry;

and it supposes, therefore, that if the lessor elected not to treat the lease as void, rent was due to him. . . . Now, I take it to be clear that the lessor could not do an act affirming the tenancy, and yet say he did not elect not to treat the breach as a forfeiture; for instance, he could not distrain for rent due at Christmas, and at the same time effectually say, that he did not elect to treat an antecedent breach of covenant as a forfeiture; his act would be taken to be rightful, and bind him, rather than his words make his act wrong."

Lord Atkinson goes on to refer to the judgment of Mellor J. in *Clough v. London and North Western Railway Company* (1871), L.R. 7 Ex. 26 at 34, who after quoting from Com. Dig. Election, C. 2, "If a man once determines his election shall be determined for ever," said: "The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shows his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease."

I think the actions of the executrices of the Zacks estate in accepting the September rent and serving the notices of 12th and 15th September with full knowledge of the agreement entered into with the "managers" were acts which constituted a waiver of any forfeiture of the lease by reason of anything that arose out of the agreement up until that time, and particularly any right of forfeiture by reason of subletting.

The further question arises whether under the terms of the agreement under which the Lee estate ceased to be the sole owner of the chattels there is not a continuing breach of covenant for which the plaintiffs may now claim a right of forfeiture. In Foa's *General Law of Landlord and Tenant*, 7th ed. 1947 at pp. 637 *et seq.*, the learned author discusses acts amounting to waiver and continuing breaches of covenant. In no case have I found a claim for forfeiture on the ground of a breach of a covenant similar to the one under consideration. The covenant is difficult to construe and particularly difficult to construe strictly. It refers in the present tense to goods that are to be brought on the premises in the future. Strict proof of breach of covenant of this character is required before permitting a landlord the right of forfeiture: *La Jeffries v. Roberts*, [1946] O.R. 10, [1946]



1 D.L.R. 602, per Robertson C.J.O. at p. 16. Such a covenant must be construed strictly and it may well be that the landlord has waived any right of forfeiture by reason of this breach, but I prefer to take the safer course and one which will do ample justice to the landlord, and construe the covenant to mean that Lee agreed that he or his estate would throughout the term of the lease be the sole owner of the goods and chattels which might be brought on the premises from time to time and the language of the lease speaks for the term of the lease, and the covenant is therefore a continuing covenant and notwithstanding that the landlords treated the lease as subsisting in September 1952, they may now claim forfeiture on the ground that the tenant is not now the sole owner of the chattels on the premises unless the breach of covenant is remedied: see 20 Halsbury, 2nd ed. 1936, p. 256, and *Penton v. Barnett*, [1898] 1 Q.B. 276.

Counsel for the plaintiffs argues that the defendants cannot rely on waiver on the ground that the plaintiffs were not possessed of full information and were not advised that Mr. Yick, the executor, was only on the premises in his personal capacity as an employee of the "managers", and relies on *Clarke v. Kirkpatrick et al.*, [1949] O.W.N. 526; *Clarke v. Grant et al.*, *supra*; *Hyde v. Pimley et al.*, [1952] 2 Q.B. 506, [1952] 2 All E.R. 102; *The King v. Paulson et al.*, *supra*; and contends that the onus is on the tenant to prove that the landlord has elected not to avoid the lease; *Matthews v. Smallwood*, [1910] 1 Ch. 777; *Re J. B. Jackson Ltd. and Gettas* (1926), 58 O.L.R. 564.

I do not think there was any evidence given at the trial that would convey any more information to Mr. Millman who acted on behalf of the Zacks estate than that contained in the agreement itself. The fact that Mr. Yick was employed by the "managers" for his personal services would seem to have little relevancy.

However, since in my view it can only be successfully argued that waiver applies to the claim that there was an underletting, this aspect of the case is not essential to my judgment.

My finding is that the executor of the Lee estate has acted throughout in the utmost good faith. In giving his evidence in the witness-box he impressed me as a man honestly trying to solve a difficult problem without in any way impairing the landlord's rights under the lease. If I am correct in holding that there was a continuing covenant that the tenant should be

the sole owner of the goods and chattels on the premises so that they might be available for distress if there was default in payment of rent due under the lease, I think this is a very proper case for relief against forfeiture. The defendants should be given the right to place the affairs of the estate in such a condition that there will be no continuing breach of the covenant as to ownership. This the tenant offered to do before this action was commenced. The notice with respect to the breach of this covenant did not comply with the statute in that no time was fixed in which the breach must be remedied: *Horsey Estate Limited v. Steiger et al.*, [1899] 2 Q.B. 79 at 92. As the matters are involved, I think the tenant should have 60 days from the date of this judgment to work out the difficulties, and in the meantime the landlord should be entitled to all rent due and as it accrues due under the lease.

The action will otherwise be dismissed.

The question of costs has given me some considerable concern. The course of action taken by Mr. Millman in September in accepting the rent and serving the notices calling on the tenant to remedy breaches of covenants under the lease all tended to lead the tenant to believe that it was not necessary to bring an action or make an application to the Court for relief against forfeiture, and in view of the fact that the notice of the 20th October did not comply with the provisions of s. 18(2) of The Landlord and Tenant Act as to the claim for forfeiture on the ground that the tenant was not the sole owner of the goods and chattels on the premises and that the action has failed to succeed on the major issue for a declaration that the lease had been forfeited and for possession of the premises, and the tenant has succeeded in making out a right to relief against forfeiture, the defendant the Lee estate should have the costs of the action. There will be no costs with respect to the other defendants.

*Judgment accordingly.*

*Solicitors for the plaintiffs: Day, Wilson, Kelly, Martin & Morden, Toronto.*

*Solicitors for the defendants: Cartwright & Cartwright, Kingston.*

[COURT OF APPEAL.]

**Regina v. National News Company Limited.**

*Criminal Law—Possession of Obscene Matter—Test of Obscenity—Absence of mens rea—Public Good—The Criminal Code, R.S.C. 1927, c. 36, s. 207, as re-enacted by 1949, 2nd sess., c. 13, s. 1.*

The test of obscenity under s. 207 of The Criminal Code is that laid down in *Regina v. Hicklin et al.* (1868), L.R. 3 Q.B. 360, viz., whether the matter charged as obscene has a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands such matter may fall. While it may be true that what will tend to corrupt and deprave in one generation will not do so in another, this is a question of fact and does not require the adoption of a new or different test, since the tendency must always be related to the time at which the test is applied. Section 207(4) does not affect this test, but merely provides that, even if obscenity is established, a person who would otherwise be guilty of an offence under the section shall not be convicted if he proves that the public good was served by his acts, and that there was no excess in his acts beyond what the public good required.

The effect of the re-enactment of s. 207 in 1949 is to put the distributor of obscene matter in the same position as the publisher, and to put the person who sells or exposes to public view, or who has in possession for the purpose of selling or exposing, in a different position, requiring, in the latter case, that there be proof that the accused acted knowingly and without lawful justification or excuse. One who has possession for the purpose of distribution, whether that distribution be by sale, by free distribution, or otherwise, cannot avail himself of absence of knowledge of the nature or presence of the obscene matter as a defence. One who has possession for the purpose of sale is within subs. 1(a) of s. 207.

APPEALS from eleven convictions, made by McDougall Co. Ct. J. in the County Court Judges' Criminal Court of the County of Carleton, for being in possession of obscene printed matter.

9th and 10th March 1953. The appeal was heard by PICKUP C.J.O. and LAIDLAW, HOPE, J. K. MACKAY and F. G. MACKAY JJ.A.

*G. W. Ford, Q.C.*, for the accused, appellant: 1. This charge should have been laid under s. 207(1) of The Criminal Code, R.S.C. 1927, c. 36, as re-enacted by 1949, 2nd sess., c. 13, s. 1, rather than under s. 207(2), since we clearly had these books in our possession for "sale" rather than for "distribution". We were a wholesaler. The statute must be strictly construed and the accused must be brought squarely within its letter and spirit: *The Gauntlet* (1872), L.R. 4 P.C. 184 at 191. If the words of a statute are equally capable of two interpretations, only one of which would make the accused guilty of an offence, then the other must be adopted. [PICKUP C.J.O.: You need not cite authorities for that proposition.] [LAIDLAW J.A.: Is it your submission that subs. 1(a) of s. 207 applies only to distribution otherwise than by sale?] Yes, *quoad* the seller; my submission



is that, considering the whole history of the legislation, it is clear that a seller is covered only by subs. 2(a). [LAIDLAW J.A.: Then we must read into subs. 1(a), after the word "distributes" some such words as "but does not sell". Why should we do that?] Because Parliament has expressly taken out one class, formerly dealt with by subs. 1, and made special provision, making members of that class guilty only if they acted knowingly. It may well have had in mind the remarks of Mulock C.J.O. in *Rex v. Britnell* (1912), 26 O.L.R. 136, 20 C.C.C. 85, 4 D.L.R. 56. [PICKUP C.J.O.: The *Britnell* case was concerned with a retailer. Why should a wholesaler be put in a different position from the publisher or manufacturer?] Because the wholesaler has, as compared with the publisher, the same limited opportunities for knowledge as the retailer.

2. The trial judge erred in finding as a fact that these publications were obscene. I concede that the legal definition of obscenity has until now been fairly well established, springing from *Regina v. Hicklin et al.* (1868), L.R. 3 Q.B. 360. The legal definition is much narrower than the common use of the word, and is in many cases the antithesis of that common meaning. [LAIDLAW J.A.: If the test laid down in *Regina v. Hicklin et al.* is applied does it not become entirely a question of fact?] The *Hicklin* case should be accepted now only with modifications; it does not take into account many factors that must be considered, including the question of public good.

My submission is that the proper test is whether matter charged as obscene has a manifest tendency to corrupt public morals by exciting the sexual passions of normal persons, both young and adult, and inciting them to acts of immorality. *Regina v. Hicklin et al.* itself indicates that the test stated by Cockburn C.J. was not to be applied literally, and that a tendency to corrupt public morals was essential. [HOPE J.A.: Cockburn C.J. illustrated his meaning in the very next sentence.] [LAIDLAW J.A.: *Rex v. De Montalk* (1932), 23 Cr. App. R. 182, is very much against your contention that the tendency must be to affect normal minds.] I shall deal with that case later. I rely on *Steele v. Brannan* (1872), L.R. 7 C.P. 261 at 267; *Rex v. Barraclough*, [1906] 1 K.B. 201 at 209; *Rex v. St. Clair* (1913), 28 O.L.R. 271 at 289, 21 C.C.C. 350, 12 D.L.R. 710, for the following submissions:

The question whether the matter complained of has a tendency to corrupt public morals is subject to the following considerations: (a) that the tendency must be manifest: *Regina v. Hicklin et al.*, *supra*; *Steele v. Brannan*, *supra*, at p. 266; (b) that the public morals with which we are concerned under s. 207 are the public's sexual morals, which points up the necessity for considering the question in the light of the language of the Code: *Rex v. Beaver* (1904), 9 O.L.R. 418 at 423-4, 9 C.C.C. 415; *Regina v. Hicklin et al.*, *supra*, at pp. 372-3; *Regina v. Thompson* (1900), 64 J.P. 456 at 457; (c) specifically, to find this tendency it must be found that the tendency is to corrupt by (i) exciting the sexual passions, and (ii) inciting to immorality; the second is the more important: *Rex v. Ballentine* (1914), 22 C.C.C. 385; *Rex v. Stroll* (1951), 100 C.C.C. 171; (d) the sexual and public morals that the Code seeks to guard are those of the normal person: *Rex v. Stroll*, *supra*; *United States v. One Book called "Ulysses"* (1933), 5 F. Supp. 182 at 184, affirmed 72 F. (2d) 705; (e) a publication is not obscene unless the tendency of the publication as a whole (not of isolated passages) is to incite to sexual immorality: the *Ulysses* case, *supra*, at pp. 706-7 (72 F. 2d); *Halsey v. The New York Society for the Prevention of Vice* (1922), 234 N.Y. 1 at 4; (f) publications whose characters or scenes repel or disgust with, rather than invite or incite to, vice, are not obscene within the section: *The People of the State of New York v. Wendling et al.* (1932), 258 N.Y. 451. [PICKUP C.J.O.: This argument is wholly dependent on your previous argument as to the normal, is it not?] Yes, I think so. If we are to consider the possible effect of a publication on *anybody*, *e.g.*, a child, it will be impossible to defend any book that deals in any way with sex or sexual relations.

3. As to the novels "Women's Barracks", "Tragic Ground" and "Journeyman", even if they were *prima facie* obscene, the trial judge should have acquitted under subs. 4, on the ground that the public good was served by their publication. Any attempt to portray a segment of life is a legitimate field of literature, and if an author sheds any light on such a field his writing is for the public good: Stephen, Digest of the Criminal Law, 8th ed. 1947, p. 177, quoted with approval in *Rex v. De Montalk*, *supra*, at p. 183; *Rex v. Barraclough*, *supra*, at p. 208.

The Courts in the United States have consistently declined to convict of obscenity in respect of books of any literary stand-

ing: the *Ulysses* case, *supra*, at p. 183 (5 F. Supp.); *People v. Viking Press, Inc. et al.* (1933), 264 N.Y.S. 534 (which dealt with another novel by Erskine Caldwell, author of "Tragic Ground" and "Journeyman"). The trial judge misdirected himself, both as to the test of obscenity, and in refusing to accept evidence on the question, and in respect of the public good.

Applying the broader test of obscenity submitted by me as the correct one, none of the magazines or books is obscene. They might affect abnormal persons, but not normal ones. [HOPE J.A.: The normal person was definitely not the test applied in *Rex v. Beaver* (1904), 9 O.L.R. 418, 9 C.C.C. 415.] MacLaren J.A. was there dealing with the question whether there was any evidence to support a conviction. There is no crime in merely appealing to the sexual instincts of men. [PICKUP C.J.O.: I should have thought that that was directly within this section.] Only if the purpose was to affect morals adversely and to incite to immorality.

As to the picture magazines, it has been held that nudity or semi-nudity is not obscene *per se*: *The People of the State of New York v. Muller* (1884), 96 N.Y. 408; *Rex v. Stroll, supra*. As to the books, none of them is obscene within the test submitted by me, and their publication and distribution should have been held to be for the public good. As to the admissibility of evidence on this issue, I refer to *Rex v. Palmer*, [1937] O.W.N. 371 at 374, 68 C.C.C. 20, [1937] 3 D.L.R. 493.

"Women's Barracks" is more apt to arouse disgust and pity among normal persons than to excite their sexual passions, and it is for the public good that information as to lesbianism should be widely distributed.

Erskine Caldwell, author of two of the other books, has a recognized place in American letters to-day. Had the broader test of obscenity been applied, it would have been clear that the pictures of vice in these books are extraordinarily repulsive. No normal person could find any invitation to emulate his characters. Their publication is in the public good because they are advantageous to both literature and sociology. Caldwell's novels are novels of social protest. The trial judge assumed that the principle that books could serve the public good because of literary merit or sociological significance was not applicable in Canada.



The novel "Diamond Lil" is in a category of its own. Its main purpose is to entertain, and it is clear that the book is not intended to be taken seriously, and that it is a melodramatic and comic farce, which could not possibly have a tendency to injure public morals.

*J. M. McLean*, for the accused, appellant: 4. Even if the accused was properly charged under subs. 1 of s. 207, the trial judge should have acquitted in the absence of any proof of *mens rea*. In any event, the trial judge should have found, in respect of the publications that were cleared through customs (the magazines and "Diamond Lil") that the proof of this clearance was conclusive, and disproved *mens rea*. If our submission on point 1 is accepted, this point does not arise, because there can clearly be no conviction under subs. 2 without proof of knowledge. My argument is that notwithstanding subs. 7, there is still a necessity for proof of some measure of guilty knowledge, even when the charge is laid under subs. 1.

The word "nature" in subs. 7 does not include "obscene nature", and the Crown must still prove that the accused knew that the matter was obscene. I concede that grammatically subs. 7 is sufficient to include knowledge of obscenity, but as a matter of judicial interpretation it should be restricted to "general nature". The effect of subs. 7, read literally, would be that a person charged under subs. 1 was to be treated as if he had read every book and seen every picture.

Under the old law the Crown had to prove both that the accused knew of the presence of the book and that he knew it was obscene: *Rex v. Britnell*, *supra*, at p. 88 (C.C.C.); *Conway v. The King*, [1944] R.L. 27, 81 C.C.C. 189 at 196, [1944] 2 D.L.R. 530; *Regina v. Hicklin et al.*, *supra*, at pp. 372-3. [LAIDLAW J.A.: Is not the judgment in *Regina v. Lawrence*, [1952] O.R. 149, 102 C.C.C. 121, 13 C.R. 425, directly against this argument?] I submit not.

Subsection 7 should be construed in this way because, (a) this is not the type of case in which the Court should construe a statute in the way adopted in *Sherras v. De Rutzen*, [1895] 1 Q.B. 918 at 921; and (b) the statute would become completely unworkable if an accused could be convicted even if he believed a book to be completely innocent.

The Customs Tariff, R.S.C. 1927, c. 44, s. 13, as re-enacted by 1931, c. 30, s. 2, provides in effect that it shall be an offence to

import immoral matter. The accused was entitled to believe that the books and magazines that had been passed through customs were considered innocent by the authorities, and therefore, since they were not manifestly obscene, the accused was justified in thinking that they were not obscene at all. The judgment in *Regina v. Lawrence, supra*, is based upon a different statute, and applies the very test indicated in *Sherras v. De Rutzen, supra*, on the question whether knowledge is necessary.

*W. B. Common, Q.C.*, for the Attorney-General, respondent [called on by the Court to argue only on points 2 and 3 of the appellant's submissions]: 2. The statute at the time of the judgment in *Regina v. Hicklin et al.* (1868), L.R. 3 Q.B. 360, is set out at p. 361 of the report. It used the word "obscene" without qualification, just as s. 207 does. This is important in considering the present validity of the test there laid down. If the *Hicklin* test is not applied, it is difficult to see what other test there can be. It is impossible to assess the effect of matter on the mind of the public generally. Since there is no change in the wording of the statute, there is no reason for discarding the *Hicklin* test, which was applied, without any reference to the public generally, in: *Rex v. Beaver* (1904), 9 O.L.R. 418, 9 C.C.C. 415; *Rex v. MacDougall* (1909), 39 N.B.R. 388, 15 C.C.C. 466; *Rex v. St. Clair* (1913), 28 O.L.R. 271, 21 C.C.C. 350, 12 D.L.R. 710.

If the test suggested on behalf of the appellant were adopted the flood-gates would be open for the acceptance of almost any publication, because it would be practically impossible to prove any actual incitement to immorality. [LAIDLAW J.A.: The *Hicklin* test has been applied in both India and Australia.]

As to the passage cited from Stephen's Digest, the author's submission there is practically the same as what is now embodied in s. 207(4). *Rex v. Barraclough*, [1906] 1 K.B. 201, was a prosecution for libel, and the whole *ratio* of the case is concerned with the form of the indictment. Both *Rex v. Ballentine* (1914), 22 C.C.C. 385, and *Rex v. Stroll* (1951), 100 C.C.C. 171, are decisions on the facts, not binding on this Court, and not reasoned judgments containing discussions of decided cases. The American decisions can be helpful only if the statutes under which they were decided are the same as ours, and this does not appear from the reports.

It is not necessary that the whole of any publication be obscene: *Paget Publications, Ltd. v. Watson*, [1952] 1 All E.R. 1256.

The finding of obscenity is a finding of fact, and this Court should not interfere with it unless the trial judge applied the wrong test.

3. The obscene episodes are not necessary to the telling of these stories. Further, even the most faithful portrayal of a segment of society is not justified if it is obscene. Otherwise, again, the flood-gates would be opened. The motive of the accused is expressly made immaterial by s. 207(6). The matter of public good is a question of fact that has been passed on by the trial judge. There was no evidence before him except the opinion of literary experts. This Court should not interfere.

As to the magazines, there can be no question of the public good; the sole question must be whether or not they were obscene.

*G. W. Ford, Q.C.*, in reply.

*Cur. adv. vult.*

7th May 1952. PICKUP C.J.O.:—The appellant, National News Company Limited, appeals from eleven convictions made on 22nd November 1952 by His Honour Judge A. C. McDougall, County Judge of the County of Carleton, sitting in the County Court Judges' Criminal Court for the County of Carleton. The convictions are all under s. 207(1)(a) of The Criminal Code, R.S.C. 1927, c. 36, as re-enacted by 1949, 2nd sess., c. 13, s. 1, which makes it an indictable offence to have in one's possession for distribution any obscene written matter, picture, model or thing whatsoever.

The charges relate to four novels and to seven picture magazines. The four novels are entitled "Women's Barracks", "Tragic Ground", "Journeyman" and "Diamond Lil". The seven picture magazines are "Paris Models", "Peep Show", "Gala", "Eyeful", "Titter", "Wink" and "Beauty Parade". No question is raised in these appeals as to proof of the appellant having in its possession the novels and picture magazines referred to, but it is argued on behalf of the appellant that the evidence discloses that these novels and picture magazines were in the possession of the appellant, not for the purpose of distribution but for the purpose of sale. Counsel for the appellant calls attention to a distinction



in the statute between having obscene written matter in one's possession for the purpose of distribution, and having it in one's possession for the purpose of sale. It is an indictable offence under subs. 2 of s. 207 "*knowingly, without lawful justification or excuse*" to have in one's possession for the purpose of sale any obscene written matter, picture, model or thing whatsoever. Counsel for the appellant argues that subss. 1 and 2 of s. 207 are mutually exclusive and that therefore the appellant could not be convicted under subs. 1 if the purpose for which it had these books and picture magazines was the purpose of sale.

I do not think that effect should be given to this contention. I think that under subs. 1 Parliament was putting the distributor in the same position as the publisher, and putting the person who sells or exposes to public view, or has in his possession for that purpose, obscene written matter, in a different position, the different position being that the person who sells or exposes to public view or has in his possession for that purpose, must act *knowingly and without lawful justification or excuse*.

There is a further difference between subss. 1 and 2 which is that subs. 7 provides that it shall be no defence under subs. 1 that the accused was ignorant of the nature or presence of the matter, picture, model, crime comic or other thing.

The differences which I have mentioned are the result of the repeal in 1949 of s. 207 as it then stood and the substitution therefor of a new section. By this change the words "*knowingly, without lawful justification or excuse*" were removed in relation to distributing obscene matter or having such obscene matter in one's possession for distribution. Subsection 7 above referred to was added at the same time.

If a person has in his possession obscene matter for the purpose of distribution, I do not think it matters whether the means of distribution be sale, consignment for sale, free distribution or otherwise. Subsection 1, in my opinion, includes any means of distribution. The purpose of this subsection, I think, plainly is to reach the maker, the printer, the publisher, and the distributor as distinct from others who may sell to the public or exhibit or expose to public view.

The Court indicated on the hearing of this appeal that a person having obscene written matter in his possession for the

purpose of distribution by means of sale came within s. 207 (1)(a). This ground of appeal therefore fails.

Another ground of appeal on a question of law raised by the appellant was that even if s. 207(1)(a) applies in these cases, there was no proof adduced in evidence to show that the appellant knew that the printed matter in its possession was obscene, even if it were in fact found to be obscene.

This argument was based upon the contention that *mens rea* is a necessary ingredient in the offences charged, except in so far as the necessity for *mens rea* as an element of the offence is removed by the statute.

Subsection 7 of s. 207 provides as follows: "It shall be no defence to a charge under subsection one that the accused was ignorant of the nature or presence of the matter, picture, model, comic or other thing."

In my opinion the deletion of the word "knowingly" as an element in the offence, and the provisions of subs. 7 referred to make it unnecessary for the Crown to prove that the appellant in fact knew the novels and picture magazines in question to be obscene, if they were in fact obscene. This ground of appeal therefore fails.

The third, and probably the main, ground of appeal was that the novels and picture magazines in question in these appeals are not obscene, and that the learned trial judge misdirected himself in applying the test of obscenity.

The learned trial judge, in considering the question of obscenity, followed the test laid down by Cockburn C.J. in *Regina v. Hicklin et al.* (1868), L.R. 3 Q.B. 360. That test is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. This test has been followed in the Courts of England and in this country for many years. I do not think the Court should formulate some new test, or adopt some other test used in other countries, in place of this test, which has been applied for so long in this country and in England. I see nothing wrong with the test. What the test requires to be considered is the *tendency* to corrupt and deprave. It may be that what would tend to corrupt and deprave in one generation may not in another generation, but that is a question of fact. It does not require the formulation or adoption of some new or different test

because the test laid down by Cockburn C.J. always involves consideration of the tendency to deprave and corrupt, which must, no doubt, be related to the time when the test is applied.

It is argued by counsel for the appellant that the learned trial judge did not properly apply this test. Counsel contends that the tendency to corrupt and deprave should be related to normal persons only. If this means persons who are immune to immoral influence from obscenity, the legislation under consideration would not be necessary at all. On the other hand, I am not holding that matter is obscene which tends to corrupt and deprave only persons who are corrupted and depraved. Between these extremes there must be a large section of the public, young and old, whose minds are not corrupt and depraved but are open to immoral influences. Into the hands of such persons a publication of this sort may fall. In relation to them, obscene matter has a tendency to corrupt and deprave. I think the learned trial judge was right in applying the test laid down by Cockburn C.J., and that he properly applied it. Applying this test, he found the four novels and the seven picture magazines to be in fact obscene. I would not disturb that finding as to any of the novels or picture magazines in question.

It is argued by counsel for the appellant that the effect of s. 207 of The Criminal Code is to change this long-established test of obscenity, and reliance is placed upon subs. 4 of s. 207. This subsection reads as follows: "No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done, and that there was no excess in the acts alleged beyond what the public good required."

In my opinion this subsection does not change the test as to what is obscene, but merely provides that a person who would otherwise be guilty of an offence in relation to obscene matter under s. 207 shall not be convicted if he proves that the public good was served by what he did, and that in what he did there was no excess beyond what the public good required. The subsection does not change something which is obscene into something which is not obscene.

As to the seven picture magazines, there was no attempt made by the appellant at the trial to prove that the public good was served by the acts of the appellant. It therefore follows



from what I have said that the seven appeals in relation to the picture magazines must be dismissed.

The same applies to the novel "Diamond Lil". Agreeing as I do with the learned trial judge that that novel was obscene, and there being no evidence adduced by the appellant to prove that its acts in relation thereto served any public good, the appeal as to that novel also fails.

As to the three other novels, "Women's Barracks", "Tragic Ground" and "Journeyman", some evidence was adduced at the trial intended to show that some public good might be served by the distribution of these novels.

As to "Women's Barracks", it was argued that the main subject of the book was lesbianism; that the author's attitude was one of pity; that the sexual episodes described, when viewed in the light of the book as a whole, tended to repel or disgust the reader and act as a warning against the dangers of lesbianism.

As to the novels "Tragic Ground" and "Journeyman", it was argued that there is some factual basis for the conditions about which the author writes; that both books are novels of social protest; that they have a sociological purpose and tendency, namely, to reveal and depict conditions of deplorable economic and social degradation existing in part of Georgia; that the author's thesis is that morality is affected by economics; that his attitude is one of pity and anger that such conditions should exist; that the sexual episodes related are not described in a fashion that makes vice attractive but, on the contrary, repulsive, and do not appear to be related for purposes of pornography but have an integral part in the novels.

The learned trial judge found as a fact against the contention of the appellant that the appellant had proved any public good to be served in the distribution of these novels. With that finding I agree. Even if the appellant could be said to have proved that some public good might be served by the distribution of these novels, the appellant has, in my opinion, utterly failed to prove that there was no excess in the acts complained of beyond what the public good required.

In the result all of the appeals fail and should be dismissed.

LAILAW and HOPE JJ.A. agree with PICKUP C.J.O.

J. K. MACKAY J.A.:—With much difficulty and some hesitation I agree in the result at which my Lord and my learned brothers Laidlaw and Hope have arrived.

My difficulty arises mainly from the following statement made by the learned trial judge in his reasons for judgment: "But I think any evidence with respect to the question of obscenity must be disregarded. That is a question for determination by the Court itself."

Here, in my opinion, the learned trial judge misdirected himself. Is one to infer from what he said that such finding falls to be determined by personal opinion, unsubstantial conjecture, whim or caprice? The criminal action at bar was tried without a jury and the learned trial judge was therefore charged with the responsibility of finding the facts and applying the law to such facts. A finding of fact must, in my opinion, have its source in evidence.

In *Regina v. Hicklin et al.* (1868), L.R. 3 Q.B. 360 at 370, Cockburn C.J. says: "Now, it is found here *as a fact* that the work which is the subject-matter of the present proceeding was, to a considerable extent, an obscene publication . . ." And Blackburn J. in the same case, at p. 377, says: "The question, no doubt, would be a question for the jury."

My difficulty, however, is resolved largely by the fact that even if the learned trial judge misdirected himself, there is ample evidence to support a finding of the obscene nature of the publication and the learned trial judge, sitting as a tribunal of fact and of law, found adversely to the appellant under s. 207(4) of The Criminal Code. No useful purpose, therefore, would be served by ordering a new trial.

Therefore, with the expression of the hesitation which I have already mentioned, I agree in the dismissal of these appeals.

F. G. MACKAY J.A. (*dissenting in part*):—I have had the privilege of reading the reasons for judgment of my Lord the Chief Justice and my brother J. K. Mackay. I agree with my brother Mackay that the learned trial judge should not have disregarded the evidence on the question of obscenity: *Fenwick v. Bell* (1844), 1 C. & K. 312, 174 E.R. 825; Wigmore on Evidence, 3rd ed. 1940, s. 1921.

I do not think that the rejection of this evidence can affect any of the charges except those in relation to the three novels

"Tragic Ground", "Journeyman" and "Women's Barracks". Having in mind that the test is that the obscenity must be of such a nature that it is likely to corrupt or deprave those who may read the books, and the observation of my Lord the Chief Justice that "it may be that what might tend to corrupt and deprave in one generation may not in another generation", and the trend in modern times towards more freedom of discussion of social problems, including those involving morals, I am of the opinion that the rejected evidence might well raise a reasonable doubt in these cases.

I would allow the appeals and direct a new trial on the charges in respect of the novels "Tragic Ground", "Journeyman" and "Women's Barracks" and dismiss the appeals in respect of the seven picture magazines and the novel "Diamond Lil".

*Appeals dismissed, F. G. MACKAY J.A. dissenting in part.*

*Solicitors for the appellant: Tuchtie & McLean, Hamilton.*

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[CHEVRIER J.]

**Re Superior Separator Company of Canada Limited.**

*Customs—"Review" of Entries by Deputy Minister—The Customs Act, R.S.C. 1927, c. 42, s. 48(2), as re-enacted by 1948, c. 41, s. 5—Whether Amendment Retrospective—Whether Right of Review Applies to Entries Made before Amendment.*

The effect of the re-enactment in 1948 of s. 48 of The Customs Act, providing for the first time for a review by the Deputy Minister of entries of goods into Canada, was not merely procedural, but was to create a new appellate jurisdiction in the Deputy Minister. There being nothing in the amended section to show an intention that it should be retroactive in operation, it follows that an importer has no right to obtain a review of entries made before the coming into force of the amendment.

AN APPLICATION for an order of mandamus.

20th June 1952. The application was heard by CHEVRIER J. in chambers at Ottawa.

*G. F. Henderson*, for the applicant.

*Christopher Robinson, Q.C.*, for the Deputy Minister of National Revenue for Customs and Excise, respondent.

14th May 1953. CHEVRIER J.:—An application for an order of mandamus requiring the Deputy Minister of National Revenue for Customs and Excise, David Sim, Esquire, of the City of Ottawa, to review the decision of the appraiser of the Department of National Revenue for Customs and Excise in respect of the entry into Canada for farmhand hydraulic loaders and attachments under customs invoices having Winnipeg entry numbers as follows:

3102A of April 17, 1947

6812A of May 8, 1947

8103A of May 15, 1947

22322A of August 13, 1947

10134A of June 14, 1948.

The following facts are found in the affidavits filed by the appellant; the respondent filed no material, but relied simply on the dispositions of the relevant statutes as hereinafter set out:

From the affidavit of M. J. Patton, who is manager of the applicant company, it appears that this applicant, whose place of business is in Winnipeg, Manitoba, is a subsidiary of Superior Separator Company of Hopkins, Minnesota, and it manufactures farm implements and equipment, including farmhand hydraulic loaders and attachments for the same. Between 1st April 1947

and 10th February 1950 farmhand hydraulic loaders and attachments were imported into Canada by Superior Separator Company of Canada, Limited, the same having been purchased from Superior Separator Company, which farmhand hydraulic loaders and attachments were entered in Canada under customs invoices under Winnipeg entry numbers as set out above.

Superior Separator Company of Canada, Limited, has since 1946 made representations to the Department of National Revenue, Customs and Excise Division, that the said farmhand hydraulic loaders and attachments should properly be classified under tariff item 409(f) instead of tariff item 427(a). It is alleged that farmhand hydraulic loaders and attachments are now classified for customs purposes under tariff item 409(f). That item has remained unchanged between the years 1946 and 1951.

The applicant paid duty in the neighbourhood of \$100,000 on the importation of the goods brought into Canada under the said customs entries on the ground that the said goods were classified under tariff item 427(a). But if the said goods imported under the said customs entries were classified under tariff item 409(f) there would be no duty payable on the importation of the same in Canada.

The applicant submits that under s. 125 of The Customs Act, R.S.C. 1927, c. 42, as amended, it could apply for a refund of such duties as were paid within 3 years. The applicant's solicitors wrote on 15th August 1951 to the Deputy Minister of National Revenue for Customs and Excise, and after setting out the number of the items added: "May we please have a review by you under Section 48 subsection 2 of the Customs Act of the decision of the appraiser as to the tariff classification of the goods covered by these entries."

There followed much correspondence between the parties. The Department took the view that: "Although you have made no direct request for refunds . . . the fact remains that refunds are involved." But the applicant puts it squarely that it is not presently asking for refunds, but simply requests that the Deputy Minister should review the appraiser's classification already referred to, and the reason is obvious.

There is no apparent right of redress by appeal from such decision, but there may be one from that of the Deputy Minister in reviewing the appraiser's decision. After the exchange of

further correspondence the Deputy Minister wrote the applicant that he was advised by the Department of Justice "to refuse to take any action under [the subsection in question], leaving it to the importers to take whatever legal proceedings they may decide upon", and that acting thereunder he would "take no further action".

The applicant again puts it squarely: all it desires for the present is that the Deputy Minister should be made to review the appraiser's decision and make his decision known.

As I understand the matter there are two features: 1st, the effect of the word "may", and 2nd, the nature and effect of the 1948 amendment. I take the second point first.

The contention of the respondent is (1) that the old s. 48 conferred certain rights on the "appraiser"; (2) that the amendment, though conserving those rights, creates a new situation in so far as the Deputy Minister is concerned, by giving him the right to review the decision of any appraiser as to the tariff classification of any goods or the value for duty of any goods; but (3) that does not apply to any matter that originates before the coming into force of the said amendment, which was the 30th June 1948. In other words, the respondent says that the said amendment has no retroactive effect.

To this the applicant replies that its rights were in existence prior to 30th June 1948; that they were in the process of being determined, should continue to be so, notwithstanding the amendment, and that in so far as the amendment affects them it is only as to the manner of procedure. The consideration of feature no. 1 will depend upon how feature no. 2 is resolved. Therefore, what is the effect of the amendment as to the enforcement of the applicant's rights which were in existence before the coming into force of the amendment?

The respondent says that the effect of the amendment is to create a new scheme of classification and review from and after 30th June 1948, that the right of review granted to the Deputy Minister is a new one and cannot be invoked in reference to rights which originated before 30th June 1948. In effect he says that s. 48(2) cannot have any retroactive effect unless it was expressly stated therein.

The respondent relies, among many other cases cited, on *Taylor v. The Queen* (1877), 1 S.C.R. 65, where, at p. 81, Richards C.J. says: "Can there be any doubt that the allowing an



appeal where no right of appeal existed materially affects the rights of parties to enforce their judgments, as well as increases the expenses?"

The respondent further relies on *Hurtubise et al. v. Desmarteau* (1891), 19 S.C.R. 562 at 563, where Ritchie C.J. says: "It is in vain to say that this is a question of procedure and not one of jurisdiction . . . if the statute was not in force when the judgment was delivered it is quite clear there is no appeal."

And the respondent also cites the following cases: *Boyer v. The King*, [1949] S.C.R. 89, [1949] 4 D.L.R. 469, 94 C.C.C. 259, 7 C.R. 257; *Marcotte v. The King*, [1950] S.C.R. 352, [1951] 1 D.L.R. 77, 98 C.C.C. 81, 10 C.R. 349; *The Colonial Sugar Refining Company, Limited v. Irving*, [1905] A.C. 369; *The Queen v. Guardians of Ipswich Union* (1877), 2 Q.B.D. 269.

So that the respondent's case is that the amendment creates a new (not a further) right of appeal, and that since there is nothing in the amendment to indicate retroactivity the applicant cannot successfully invoke that right of appeal.

The applicant submits that the whole matter is only one of procedure. It says that the review by the Deputy Minister is not a new remedy, but that it is the continuation of a right which the applicant had to be heard in review by the Board of Customs and that, that right of review before the Board of Customs having been abrogated by the amendment, the right of review is now to be exercised by the Deputy Minister, and that therefore it is merely a matter of procedure.

It submits further that its right of having the Customs Board make a fresh appraisalment is not taken away, but is now given to the Deputy Minister; that there could be no justification for the destruction of that right, though there be justification for the hearing of that right by the newly-created authority, *i.e.*, the Deputy Minister. Coming back to the applicant's contention, it is, therefore, that the effect of the amendment has been to substitute the Deputy Minister for the Board of Customs without changing the powers and that that is purely a matter of procedure which cannot affect the prior rights of the applicant.

And, it says, since the Deputy Minister is the "altered mode" and will not proceed, it is entitled to an order of mandamus against him.

The applicant relies on numerous authorities cited, amongst them being *Warner v. Murdoch*; *Murdoch v. Warner* (1876), 4

Ch. D. 750; Maxwell on The Interpretation of Statutes, 9th ed. 1946, at p. 232: "... if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode." The author refers to *Wright v. Hale* (1860), 30 L.J. Ex. 41; *The Attorney-General v. Sillem et al.* (1862), 10 H.L. Cas. 704, 11 E.R. 1200.

A demand was made upon the Deputy Minister to review the entries. He has been advised by the Department of Justice to refuse to take any action under s. 48(2) as amended.

The applicant, to save its rights, though having no decision from the Deputy Minister, applied to the Tariff Board for a hearing, but the Tariff Board, having no decision from the Deputy Minister, could not entertain the applicant's application for redress. This appears from the affidavit of Gordon E. Hooper, customs consultant of the applicant, sworn to on the 26th May 1950, in ex. F thereto.

But it does not and should not follow, that existing rights should be extinguished in the manner in which it is submitted the ones in question were abrogated.

The right of appeal, at least from any tribunal of first instance, is in British jurisprudence a principle of fundamental importance and recognition.

The applicant's submission is that the arbitrary refusal of the Deputy Minister to render a decision under s. 48 denied the applicant (a) a legal right to appeal, (b) the right to apply for a refund of duty paid.

For these reasons it submits that the Deputy Minister should be ordered to review.

Section 48 of The Customs Act, as it existed at the time this matter arose, 17th April 1947, to 30th June 1948, was as follows:

"If upon any entry or in connection with any entry it appears to any Dominion appraiser or to the Board of Customs that any goods have been erroneously appraised, or allowed entry at an erroneous valuation by any appraiser or collector acting as such, or that any of the foregoing provisions of this Act respecting the value at which goods shall be entered for duty have not been complied with, such Dominion appraiser or such Board may make a fresh appraisement or valuation, and may direct, under the valuation or appraisement so made, an amended entry and payment of the additional duty, if any, on such goods, or a refund of a part of the duty paid, as the case requires, sub-

ject, in case of dissatisfaction on the part of the importer, to such further inquiry and appraisement as in such case hereinafter provided for."

It appears by the affidavit of G. R. Hunter filed, and sworn to on 19th May 1952, that "Superior had and has made continuous efforts since December of 1946 to have the Department of National Revenue, Customs and Excise Division, clarify for duty purposes, equipment of the nature of that covered by said customs invoices classified under tariff item 409(f) rather than tariff item 427(a)."

During the time that said s. 48 was in effect, if it appeared to any Dominion Appraiser or to the Board of Customs that any goods had been erroneously appraised such Dominion Appraiser or such Board could make a fresh appraisement or valuation, subject, in case of dissatisfaction on the part of the importer, to such further inquiry and appraisement as was further provided for.

It was therefore under those provisions that the rights of the applicant were to be interpreted. But on the 30th June 1948 the above section was repealed and the following was substituted by c. 41, s. 5 of that year:

"(1) If, upon any entry or in connection with any entry, it appears to any Dominion Customs Appraiser that any goods have been erroneously classified or appraised or allowed entry at an erroneous rate or valuation by any appraiser or collector acting as such, or that any of the foregoing provisions of this Act respecting the classification or value at which goods shall be entered for duty have not been complied with, such appraiser may make a fresh appraisal or valuation, and may direct an amended entry and payment of additional duty on such goods, or a refund of the whole or a part of the duty paid, as the case requires, subject to review by the Deputy Minister.

"(2) The Deputy Minister may review the decision of any appraiser as to the tariff classification of any goods or the value for duty of any goods."

The wording of the new section is not in all respects identical with the old section, and the main changes in the new one are the deletion of the Board of Customs and the newly-created right of "review" by the Deputy Minister in the first subsection, and the provision in subs. 2 to the effect that the Deputy Minister may review the decision of any appraiser, etc.



The applicant submits that the word "may" in subs. 2 is to be construed as "shall" and cites a number of authorities in support of such construction. Its further submission is that the rights which it had under the old section have not been obliterated, but are still existent and are to be determined and administered by the terms of the new section. And as this new section allows review by the Deputy Minister, then its right to have a fresh appraisalment under the old section is preserved, and is now a right of review by the Deputy Minister, who may be enjoined by way of mandamus to make such review when called upon to do so as in this case.

Here it is well to note that subs. 2 is a completely new provision, *i.e.*, neither contained in nor contemplated by the old section.

At this stage the applicant further submits that if the Deputy Minister does not "review", or cannot be made to review, then its right of appeal to the Tariff Board under the old section is gone, and it cannot appeal to the Tariff Board under s. 49, which is as follows:

"If the importer, owner, consignee or agent is dissatisfied with the first appraisalment, any appraiser, or any collector acting as such, or the persons to be selected as hereinafter mentioned to examine and appraise any goods, may call before him or them and examine upon oath any owner, importer, consignee or other person, touching any matter or thing which such appraiser, collector or persons deem material in ascertaining the true value of any goods imported, and may require the production on oath of any letters, accounts, invoices, or other papers or account books relating to the same in the possession of such owner, importer, consignee or other person."

The Tariff Board has ruled that there is no decision of the Deputy Minister which would enable the Tariff Board to entertain an appeal.

The applicant submits that its position now is: (a) it has no right of appeal under the old s. 48; (b) it has no right of appeal to the Tariff Board under the new s. 48 as there is no decision before the Tariff Board as contemplated by s. 49.

It therefore argues that its existing and substantial rights cannot be frustrated or obliterated by the operation of the new s. 48 when there is nothing in that section which shows or

tends to show that it was the intention of Parliament so to do and that it therefore amounts to a denial of justice.

The principle that existing rights should be protected is too well established to require further discussion. The applicant says that those acquired and existing rights which no longer can be dealt with under the old s. 48 must be dealt with under the new s. 48; and perhaps recognizing (a) the strength of the respondent's position in the line of cases which uphold the principle that a statute conferring appellate jurisdiction applies only to cases arising after the statute came into force (*Taylor v. The Queen*, *supra*; *Hurtubise et al. v. Desmarteau*, *supra*; *Boyer v. The King*, *supra*; *Marcotte v. The King*, *supra*, as well as (b) the equally well established principle that a statute taking away a right of appeal or changing it does not affect cases that arose before it came into force, which remain governed by the previous law (*Hyde v. Lindsay* (1898), 29 S.C.R. 99; *The Colonial Sugar Refining Company, Limited v. Irving*, [1905] A.C. 369); and (c) the fact that there is nothing in the new s. 48 showing any intention that it should have retroactive effect, the applicant argues that the amendment is only one of procedure to replace what was the former procedure. In support of that, its counsel cited Maxwell, *op. cit.*, p. 233, to the effect that the general principle is that an alteration in procedure is retrospective, that no person has any vested right in procedure, and that alterations in procedure do not affect existing rights (*Gardner v. Lucas et al.* (1878), 3 App. Cas. 582 at 603), that old transactions are to be enforced by the new form of procedure (*Wright v. Hale* (1860), 30 L.J. Ex. 41 at 42), and that jurisdiction being procedural the new procedure applies according to the statute or interpretation (*Brockwell v. Bullock* (1869), 22 Q.B.D. 567 at 571).

But is this amendment conferring a right of review on the Deputy Minister procedural only, or is it substantive, granting new jurisdiction to the Deputy Minister? It becomes important to see how this amendment came about.

The application is for an order of mandamus to be directed to the Deputy Minister to review an appraiser's decision in respect of entries made in 1947 and 1948. The applicant submitted that the Deputy Minister has the duty to review under s. 48(2) which provides that he may review, and that one of the reasons why he should review is that he is a link in the chain of appeals starting from the decision of the appraiser and going through

to the Supreme Court, in order to correct whatever injustice may have been caused by decision of an intermediate tribunal. The old s. 48 came before the Supreme Court of Canada in the matter of *Re The Jurisdiction of The Tariff Board of Canada*, [1934] S.C.R. 538, [1934] 4 D.L.R. 193. There, Rinfret J., as he was then, held, for the Court (p. 549), that the Dominion Appraiser and the Tariff Board had jurisdiction by way of appeal from an appraiser's decision.

The applicant argues from that that the Deputy Minister's jurisdiction in s. 48(2) is by way of appeal and that his status is to review the decision of the appraiser and that in the circumstances of this case his duty is to exercise that jurisdiction and if he refuses or neglects to do so that he may be ordered to do so by mandamus.

If his jurisdiction is by way of appeal then what is its extent? The new s. 48 made considerable or extensive changes in the Act with respect to appeals as distinct from the old s. 48. The old section gave jurisdiction to the Dominion Appraiser or the Tariff Board by way of appeal from an appraiser to consider the value and direct a new entry. Accordingly, there was no jurisdiction as to the rate of duty, or as to tariff classification. If the importer was dissatisfied there was to be a further appraisal by a board of three: ss. 49 to 53. But their decision applied only to the case submitted: s. 52(3).

Then it is to be noted that the question of rates of duty, *i.e.*, tariff classification, is to be dealt with differently (s. 54). Further whenever there is any difference or doubt as to the rate of duty and there is no previous binding decision, the Tariff Board is empowered to declare the rate or that the goods are exempt from duty, subject to appeal in sixty days to the Governor in Council; and the declaration of the Tariff Board or by order in council is to have statutory force.

Now by the 1948 amendment the new s. 48 replaced the old one and ss. 49 to 54 were replaced by quite different provisions. The change should be noted, though briefly. By the amendment references to the Tariff Board are dropped and the Dominion Appraiser is given power to consider the classification as well as value; s. 48(2) provides for review by the Deputy Minister; by s. 49 an appeal is provided for from the decision of the Deputy Minister to the Tariff Board, to the Exchequer Court of Canada, and to the Supreme Court of Canada.



So that the amendment of 1948 altered the law with respect to the appellate jurisdiction on questions of classification to the effect that instead of this jurisdiction being first in the Tariff Board, with a further appeal to the Governor in Council, it is now in the Dominion Appraiser just as questions of value were formerly and remain, and then successively in the Deputy Minister, in the Tariff Board, in the Exchequer Court, and in the Supreme Court of Canada.

From that it is made to appear that until the 1948 amendment the Deputy Minister had no relevant appellate jurisdiction. And from that the conclusion follows that the jurisdiction of the Deputy Minister to review is a completely new jurisdiction created by the amendment.

It is trite law that a statute conferring appellate jurisdiction applies only to cases arising after the statute came into force: see *supra*.

Whether an order for mandamus will lie or not against the Deputy Minister under s. 48(2) for matters that have arisen since the creation of this new jurisdiction is not a question for consideration at this stage, but I am of the opinion that no order for a mandamus may issue against him for matters which have arisen anteriorly, such as in the matter presently under review.

It does seem a hardship that some clear provision was not included to protect priorly-acquired rights. But the words of Masten J.A. in *Re Ashby et al.*, [1934] O.R. 422 at 428, [1934] 3 D.L.R. 565, 62 C.C.C. 132, may be aptly quoted here: " ' . . . administrative' [tribunals] have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency."

In the result the application is hereby dismissed. As this is, so far as I know, the first time that this matter has been before the Court for interpretation, there will be no costs.

*Application dismissed without costs.*

*Solicitors for the applicant: Gowling, MacTavish, Osborne & Henderson, Ottawa.*

[LEBEL J.]

**Re Ross and Board of Commissioners of Police for the City of Toronto.**

*Municipal Corporations—Regulatory and Licensing By-laws—Boards of Police Commissioners—Powers and Duties—Duty to Act Judicially—Review on Appeal—Impropriety of Discriminatory Enforcement of Licensing By-law—Necessity for Permitting Applicant for Licence to Answer Allegations against him—The Municipal Act, R.S.O. 1950, c. 243, ss. 263(4), (7), (8), 406.*

*Police—Powers, Discretion and Duties of Boards of Police Commissioners—Discriminatory Enforcement of Licensing By-law—Refusal to Hear Applicant's Side of Case—Review on Appeal—The Municipal Act, R.S.O. 1950, c. 243, ss. 263(4), (7), (8).*

The effect of subs. 7 of s. 263 of The Municipal Act is to repeal the concluding words of subs. 4 of the same section (which was enacted earlier than subs. 7), to the extent that the latter provides that the action of a board of commissioners of police in refusing or revoking a licence "shall not be open to question or review by any court". An appeal under subs. 7 is a matter of right, and the provision in subs. 8 that the practice and procedure on such an appeal shall be "as nearly as may be" the same as on an appeal from the Master in a civil action or proceeding does not make subs. 7 unworkable. Where differences or difficulties of interpretation are encountered the Court must do all it can to carry out the object of the Legislature. *Re McBride and Stewart*, [1932] O.R. 176 at 177, applied.

Since a judge hearing an appeal from the Master may make such order as he thinks the Master should have made on the material, it follows that a judge hearing an appeal from the refusal of a licence, if he thinks the board was wrong in its decision, may order that the licence be forthwith granted.

Although it is true that a board of police commissioners is not required to give any reason for its decision, and that a notice of appeal served on it does not require it to show cause, it cannot, by merely remaining silent and offering no explanation, defeat the right of appeal expressly given. If it makes no attempt to controvert the statements of fact in material filed by an appellant, those statements will be accepted. *Minister of National Revenue v. Wrights' Canadian Ropes, Limited*, [1947] A.C. 109, applied. The board does not function solely as an administrative body, with absolute discretion, since its decisions are made subject to appeal to a Court of law, and the mere fact that the board is required to exercise a discretion does not make its decision final or conclusive if it is contrary to law. *Pioneer Laundry and Dry Cleaners, Limited v. Minister of National Revenue*, [1939] S.C.R. 1; [1940] A.C. 127, applied; *Re Silverberg and Board of Commissioners of Police for the City of Toronto*, [1937] O.R. 528, not agreed with.

The power to license, regulate and govern does not permit of clear discrimination. *Forst v. City of Toronto* (1923), 54 O.L.R. 256, applied. If, therefore, a board of police commissioners, in refusing a licence, does so apparently for reasons that clearly show that it is discriminating in favour of one class of applicants and against another class, its decision will be set aside as against sound and fundamental principles.

In dealing with an application for a licence such a board must act judicially, and must not refuse the application without giving due consideration to the applicant's position, allowing him to state his case and to support his position by calling evidence, if necessary. This is particularly the case if an allegation has been made against the applicant that might, if true, justify the refusal of a licence, but has been denied by him. *Sharp v. Wakefield*, [1891] A.C. 173 at 179, applied.

AN APPEAL from a decision of the Board of Commissioners of Police for the City of Toronto, refusing to issue a taxi-cab licence to the appellant.

28th April 1953. The appeal was heard by LEBEL J. in chambers at Toronto.

*R. N. Starr, Q.C.*, for the appellant.

*J. Johnston*, for the Board, *contra*.

20th May 1953. LEBEL J.:—This is an appeal from a decision of the Board of Commissioners of Police for the City of Toronto refusing the appellant's application for an owner's cab or taxi-cab licence.

The appellant is a taxi-driver who has earned his living as such for the whole of his adult life. He was formerly an equal partner with one Clifford A. Smith, in a taxi-cab business known as Imperial Taxi. The partnership owned six cabs and held by authority of the respondent Board three cab-owner's licences, all in the name of Smith. Smith was drowned in the fall of 1951, which necessitated the determination of the partnership. Negotiations were had for this purpose between the deceased's estate and the appellant and were successfully concluded. While they were in progress the appellant's solicitor, on 22nd February 1952, wrote to Inspector Marshall of the Toronto City Police, the officer apparently delegated by the Chief Constable by authority of s. 2(2) of the Board's by-law No. 214-A, to supervise all persons licensed. He informed the inspector that owner's cab-licences were sought for the three unlicensed cabs mentioned, two in the name of Smith's widow and one in the appellant's name, and stated that the application was not a new one since he had appeared before the Board in the spring of 1951 and pressed it then—apparently on behalf of both Smith, who was then alive, and the appellant. He also informed the inspector that the Board had then ruled that no further licences would be issued until October 1951.

The appellant's solicitor appeared before the Board again in the spring or summer of 1952 and at this stage pressed only for a licence in favour of the appellant, but the hearing was adjourned until the final accounting between the Smith estate and the appellant had been completed. Following its completion, in March 1953, he requested an appointment to enable him to proceed with the application. The 2nd April 1953 was then fixed



and the application was heard that day. On 9th April 1953 the appellant was notified by the Board that his application had been refused.

The facts recited are taken from the appellant's affidavit filed in support of his appeal and from the exhibits thereto; and what is alleged to have happened at the hearing on 2nd April appears from the appellant's same affidavit and from the affidavit of one James Knight, who was present at the hearing. Mr. Knight professed to corroborate the appellant's version of what took place at the hearing in some respects. However, in conclusion he states what he alleges was said by members of the Board upon the hearings of other unrelated applications, and that part of the affidavit is clearly irrelevant and has not been considered by me.

What is sworn to have happened and been said at the hearing before the Board on 2nd April is set forth in paras. 7, 8, 11 and 12 of the appellant's affidavit. These paragraphs read as follows:

"7. On April 2nd 1953 I attended before the Board of Commissioners of Police of the City of Toronto, along with my solicitor R. N. Starr. The evidence before the Commission was adduced as follows.

"Mr. Starr read to the Commission the copies of the letters attached hereto and marked Exhibits 'A', 'B', 'C' and 'D'. Secondly Mr. Starr stated to the Commission that the accounts between myself and the Estate of Clifford A. Smith had now been settled to the complete satisfaction of Wm. R. Allen of Allen & Meyrick, a solicitor in this City.

"Mr. Allen was present at Mr. Starr's request, and confirmed this to the Board of Police Commissioners of Toronto by so stating viva voce. Mr. Allen further stated that he had had nothing but the utmost co-operation and fair dealing from me, that the assets of Imperial Taxi had long since been turned over physically to the widow of Clifford A. Smith without obtaining from the widow any authority or direction or release, and that I had at all times acted towards Mrs. Smith with the highest motives. The Board then asked Mr. Allen if Mrs. Smith the widow of Clifford A. Smith was content to assign one of the licenses which had been transferred from her deceased husband's name to her, to me. Mr. Allen said that he had no instructions, but that he

could not advise it because the business was her sole source of livelihood.

"In the third place Mr. Starr stated to the Commission that I had a clean and unblemished record, and that upon that ground the Commission had no basis to refuse me a license. This statement, which was made by Mr. Starr twice, the Board admitted was true.

"In the fourth place the commissioner Mr. McFadden stated to Mr. Starr that my application was nothing more nor less than an application by one individual for an independant's [sic] license which was against the express policy of the Board. Mr. Starr stated that it was an application of long standing since the Spring of 1951, that it was being made in extenuating circumstances, that I had through my consideration of the widow of my partner refused to take any steps to deprive her of any rights which I had in the partnership of Imperial Taxi, and which might have succeeded in having at least one of the licenses registered in the name of her deceased husband, transferred into my name; and finally that my application had been made in the Spring of 1951 under circumstances which did not offend the expressed policy of the Board.

"The Chairman of the Commission then stated to Mr. Starr that it was an application for an independant's license, and that the policy of the Board was opposed to granting an independant a license.

"8. Inspector Marshall then stated to the Board that some years back, I had sold some 19 licenses registered in my name to some 19 individual cab owners for the sum of \$125,000.00. This statement was not in accord with the facts and I so stated to the Board. Immediately the Chairman seized upon the statement that I had sold cab owners' licenses and thereafter turned a deaf ear to anything that Mr. Starr said.

"11. In reply to the Chairman's remarks about selling or dealing in licenses, Mr. Starr stated that the transaction had been fully disclosed to the Board in 1950, that it had the full approval of the Board, and I believe the Board would not have approved the transaction if there had been any question of 'selling licenses', because the Board has always indicated publicly that selling or trafficking in licenses is something of which it does not approve. The Chairman's reply to Mr. Starr was that what the Board did in 1950 was no concern of his.

"12. I then stood up, and said to the Board that I was not getting any younger, that I had been a taxi driver all my life and knew no other trade, that I wished to personally operate a taxi as an independant. The Chairman said to me that at one time I had 19 licenses registered in my name. I admitted this, and stated that it was all in the East End Taxi deal which had been fully dealt with by the Board some years before. To this the Chairman paid no attention."

In paras. 9 and 10 the appellant explains away the allegation that he had ever "sold cab owner's licences". He points out that the licences involved were owned by two limited companies, though issued in the names of himself and Smith. He also states that the issued shares in these companies belonged to Smith and himself; that the companies' assets were sold in 1950 to the persons who drove the cabs—apparently the owners of the cabs, although the point is not clear; that "the value placed on those assets was equivalent to the then market value of the physical assets transferred, with nothing allowed for goodwill and nothing allowed for the licenses", and, finally, that the transfer of the licences to the new owners under the terms of an agreement dated 4th April 1950, and appearing as ex. "I" to the affidavit, was approved by the Board after a full hearing.

The Board has allowed all these alleged facts to go uncontradicted. Mr. Johnston argues that they are inconsequential and that upon the authority of *Re Silverberg and Board of Commissioners of Police for the City of Toronto*, [1937] O.R. 528, [1937] 3 D.L.R. 509, 68 C.C.C. 403, I must ignore them as a matter of law. I shall endeavour to deal with that argument presently.

It is now necessary to consider the nature of the appeal which The Municipal Act, R.S.O. 1950, c. 243, gives a person dissatisfied with a decision of a board of commissioners of police refusing or revoking a licence. The pertinent provisions of the Act are contained in s. 263, subss. 4, 7 and 8. These subsections read:

"(4) Subject to *The Theatres and Cinematographs Act*, the granting or refusing of a licence to any person to carry on a particular trade, calling, business or occupation, or of revoking a licence under any of the powers conferred upon a council or a board of commissioners of police by this or any other Act, shall be in its discretion, and it shall not be bound to give any reason



for refusing or revoking a licence and its action shall not be open to question or review by any court.”

“(7) Notwithstanding subsection 4 the decision of the board of commissioners of police in refusing or revoking a licence shall be subject to an appeal therefrom to a judge of the Supreme Court whose decision shall be final.

“(8) The practice and procedure on and in relation to an appeal made under subsection 7 shall be the same, as nearly as may be, as in the case of an appeal from a decision of the Master of the Supreme Court in an action or proceeding in the Supreme Court.”

Section 263 was numbered 262 in R.S.O. 1927, c. 233. It did not contain the present subss. 7 and 8, which were added by 1937, 1 Geo. VI, c. 47, s. 16.

In my opinion subs. 7 expressly repealed the concluding words of subs. 4 as they apply to an appeal from the decision of a board of commissioners of police refusing or revoking a licence. Whether it was intended to effect a repeal of all the words following the comma in the sixth line of subs. 4 is not important because the board, like a Court, is not bound by the general law to give reasons for its decision. But the words immediately following, *viz.*, “and its action shall not be open to question or review by any court” are repugnant to the clear intention expressed in subs. 7. If the words at the beginning of the latter subsection “Notwithstanding subsection 4” do not effect the express repeal I have mentioned, as I think they do, then there clearly is a repeal by implication. “Where two Acts are inconsistent or repugnant, the later will be read as having impliedly repealed the earlier”: Craies on Statute Law, 5th ed. 1952, p. 337, citing *Paine v. Slater* (1883), 11 Q.B.D. 120.

Subsection 7 gives a person an appeal against a decision of a board, and the appeal is therefore as a matter of right. It is stated in subs. 8 that the practice and procedure in relation to the appeal “shall be the same, as nearly as may be,” as in the case of an appeal from the decision of the Master in an action or *proceeding* in the Supreme Court. The rule of practice governing such an appeal is Rule 508. By its provisions: “A person affected by an order of the Master . . . may appeal therefrom to a Judge in Chambers.” The appeal is to be “by motion, on notice served within four days and returnable within ten days after the decision complained of”. Although some of

the provisions in the Rule are inappropriate to the hearing of an appeal from a decision of a board, I have set out the gist of it. The legislation leaves much to be desired, for as Mr. Justice McTague points out in the *Silverberg* case, there are "fundamental differences between the functions of the Master and the functions of the Board of Police Commissioners", but with respect for the learned judge's observation on the point, I do not think that these differences are insurmountable from the standpoint of a person affected by an order of the Board, as seems to be implied in the judgment. The Legislature has given such a person an appeal to the Court as of right, and the words "as nearly as may be" show that it understood that these differences would be encountered. These words have been interpreted to mean that where differences or difficulties of interpretation exist, a Court must do all it can to carry out the object of the Legislature. To quote Masten J.A. in *Re McBride and Stewart*, [1932] O.R. 176 at 177, [1932] 1 D.L.R. 624:

"In Craies on Statute Law, 3rd ed., p. 90, it is said: 'However difficult, not to say impossible, it may be to put a perfectly logical construction upon a statute, a Court of Justice is bound to construe it, and, as far as it can, to make it available for carrying out the objects of the Legislature, and for doing justice between parties.' And in Maxwell on the Interpretation of Statutes, 7th ed., p. 204, the rule is stated as follows:—"The words of a statute must be construed so as to give a sensible meaning to them if possible. They ought to be construed ut res magis valeat quam pereat."

"The cases referred to in the text books appear to me to bear out the law as I have quoted it."

A person who opposes an application for a licence is affected by the Board's decision and is entitled to notice of an appeal, but an applicant for a licence does not lose his right of appeal because no one opposes him. While, strictly speaking, the Board cannot be a party affected by its own decision, it is certainly an interested party, and it must be assumed that the Legislature, in giving "a person affected" a right of appeal in a matter of this kind, knew that a board's decision would in most cases affect no one else. At all events, the appellant served notice of appeal upon the Board in the instant matter and there is no other party upon whom notice could be served. It is true that the appellant's notice of appeal was served, and the matter was brought on be-

fore me, outside the times limited by the Rule, but there has been no undue delay and no prejudice to the Board has been claimed thereby or has resulted. This is a matter in court, no time-limits for the appeal have been fixed by the statute, and in accordance with practice governing in such a matter the times limited by Rule 508 will be extended and the notice of appeal will be validated.

As I have said, it is contended that the Board is not bound to offer any explanation, to produce its minutes, to make any answer, or give reasons for its decision. This is undoubtedly so, apart from the language of subs. 4 of s. 263; and a notice of appeal served upon a board does not require it to show cause. But to urge, as Mr. Johnston did, that the appellant's sworn allegations are inconsequential and must be ignored as a matter of law seems somewhat surprising. To agree with that submission is to say that all the Board has to do to have its decisions sustained is to keep quiet. This contention is supported, it is argued, by the judgment in the *Silverberg* case, but, analysed carefully, it does not support that rather remarkable proposition, for there the learned judge said at p. 530: "The only material filed on the motion is an affidavit of the applicant in which he sets out the history of his ownership of the premises and the general conditions prevailing in the neighbourhood. No attempt is made to outline what took place before the Board of Commissioners or what evidence was before it."

At all events, the point has been set at rest by the Privy Council in *Minister of National Revenue v. Wrights' Canadian Ropes, Limited*, [1947] A.C. 109, [1947] 1 D.L.R. 721, [1947] C.T.C. 1, [1947] 1 W.W.R. 214 (*sub nom. Wrights' Canadian Ropes, Limited v. Minister of National Revenue*) to which authority I shall need to refer again. In that case the Minister gave no reason for disallowing certain income deductions claimed, the argument being that under the section of The Income War Tax Act, R.S.C. 1927, c. 97, there in question he was not required to give reasons for his decision because he might "disallow any expense which he in his discretion [might] determine to be in excess of what [was] reasonable or normal for the business carried on by the taxpayer . . . ." In answer to the implied submission, I quote the words of Lord Greene at p. 123:



“Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action under s. 6, sub-s. 28. But this does not necessarily mean that the Minister by keeping silence can defeat the taxpayer’s appeal. To hold otherwise would mean that the Minister could in every case, or, at least, the great majority of cases, render the right of appeal given by the statute completely nugatory.”

I refer now to two other points dealt with in the authority just cited. In the *Silverberg* case, *supra*, at p. 531, Mr. Justice McTague expressed the view that a board of commissioners of police is an administrative body as contrasted with a judicial one and he said: “Within its province, it is a law unto itself, and applies, quite properly, arbitrary subjective standards of its own. . . . It is not a court of record and under sec. 262(4) [now s. 263] . . . the granting or refusing or revoking a licence shall be in its discretion, and it shall not be bound to give any reasons for refusing or revoking a licence.” With respect I am unable to agree that such a board functions as an administrative body when its decisions are made the subject of appeal to a Court of law. Such decisions are not final or conclusive, in my opinion, unless made so by statute; and the mere fact that the person or body is required to exercise a discretion does not make that decision final or conclusive if it is contrary to law. I quote again from Lord Greene in the *Wrights’ Canadian Ropes* case, at p. 122 as follows:

“The reference to ‘discretion’ in this context does not, in the opinion of their Lordships, mean more than that the Minister is the judge of what is reasonable or normal. If the matter had stood there, and there had been no right of appeal against the decision of the Minister, the position would have been different from what it is. But in contrast to cases arising under sub-ss. 3 and 4 of s. 6, where the decision of the Minister is to be ‘final and conclusive’, a right of appeal to the Exchequer Court is given, and the appeal is to be regarded as an action in that court. This right of appeal must, in their Lordships’ opinion, have been intended by the Legislature to be an effective right. This involves the consequence that the court is entitled to examine the determination of the Minister and is not necessarily to be bound to accept his decision. Nevertheless, the limits within which the court is entitled to interfere are, in their

Lordships' opinion, strictly circumscribed. It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the court, in their Lordships' opinion, cannot interfere: the section makes the Minister the sole judge of the fact of reasonableness or normalcy and the court is not at liberty to substitute its own opinion for his. But the power given to the Minister is not an arbitrary one to be exercised according to his fancy. To quote the language of Lord Halsbury in *Sharp v. Wakefield*, [1891] A.C. 173, 179 he must act 'according to the rules of reason and justice, not according to private opinion . . . according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular'. Again in a case under another provision of this very s. 6 (s. 6, sub-s. 1), where a discretion to fix the amount to be allowed for depreciation is given to the Minister, Lord Thankerton in delivering the judgment of the Board said 'The Minister has a duty to fix a reasonable amount in respect of that allowance and, so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer; but it is equally clear that the court would not interfere with the decision, unless—as Davis J. states—"it was manifestly against sound and fundamental principles." ' (*Pioneer Laundry & Dry Cleaners, Limited v. Minister of National Revenue*, [1940] A.C. 127, 136, [[1939] 4 All E.R. 254, [1939] 4 D.L.R. 481, [1939] 3 W.W.R. 567.]")

In the authority lastly referred to and commented upon by Lord Greene, *viz.*, the *Pioneer Laundry* case, the Minister exercised his discretion unfavourably to the taxpayer and in so doing was held not to have exercised it properly. He gave reasons in that case and I quote from the judgment of Lord Thankerton at p. 137:

" . . . the reason given for the decision was not a proper ground for the exercise of the Minister's discretion . . . he was not entitled, in the absence of fraud or improper conduct, to disregard the separate legal existence of the appellant company, and to inquire as to who its shareholders were and its relation to its predecessors."

It should also be observed that in the *Pioneer Laundry* case in the Supreme Court of Canada, [1939] S.C.R. 1, [1939] 1

D.L.R. 246, Davis J. had said, with the concurrence of the Chief Justice:

"The appellant was entitled to an exemption or deduction in 'such reasonable amount as the Minister, in his discretion, may allow for depreciation.' That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles."

With this opinion the Privy Council agreed at p. 136.

I return now to a consideration of the actions of the Board in refusing the appellant's application for a licence and ask myself whether the appellant has shown that the Board has acted in contravention of some fundamental principle of law.

So far as the only evidence before me goes, I am unable to find anything that could have justified the Board's refusal of the appellant's application and Mr. Starr contends that it is plain why it was rejected. He refers to the statements made during the course of the hearing by the chairman and by Mr. McFadden, a member of the Board, to the effect that as a matter of policy the appellant would not be licensed because he was an independent cab-owner, and argues that the Board has thus manifestly discriminated in favour of "fleet owners" of cabs. He also contends that Inspector Marshall's unsupported statement that years back the appellant had sold some 19 licences registered in his name for \$125,000 is shown in the material to have influenced the chairman, at least. If there was anything objectionable in that, he says that the Board should have accepted the appellant's denial of the fact in the absence of proof to the contrary.

First, as to the question of discrimination. The Board's by-law was passed pursuant to the power given by s. 406 of The Municipal Act, which authorizes boards of commissioners of police to pass by-laws for licensing, regulating and governing owners and drivers of cabs amongst others. It defines an "Independent Owner" in s. 1(i) as "an owner of a cab who holds a license to use or operate one cab only", and by the next subsection a "Fleet Owner" is "an owner of cabs who holds a license or licenses from the Board to use or operate more than one cab".

I think it is the settled law of this Province that a power to license, regulate and govern does not permit of clear discrimination. If authority for this proposition is sought, one has only to



consider the observations of Middleton J.A. in *Forst v. City of Toronto* (1923), 54 O.L.R. 256 at 278-9. I quote:

“When the municipality is given the right to regulate, I think that all it can do is to pass general regulations affecting all who come within the ambit of the municipal legislation. It cannot itself discriminate, and give permission to one and refuse it to another; and, *a fortiori*, it cannot give municipal officers the right, which it does not possess, to exercise a discretion and ascertain whether as a matter of policy permission should be granted in one case and refused in another.”

It is unnecessary to attempt to define the Board’s power to regulate the number of licences that may be issued. Here, two of the Board’s spokesmen have declared that their policy is not to issue any more independent owner’s licences, whereas the by-law which contains their own regulations expressly provides that such owners may be licensed. In effect what the Board has said is that a person may not now be licensed as an owner unless he holds a licence or licences to use or operate more than one cab. This is clearly discriminatory and creates a monopoly in favour of fleet owners. The Board’s action is thus against sound and fundamental principles.

In view of this conclusion it is unnecessary to deal with Mr. Starr’s second ground of attack upon the Board’s decision because it must be assumed, in the absence of anything to the contrary, that the refusal of the appellant’s application was based, in part at least, upon their announced discriminatory policy. However, this other principle is also fundamental.

It may well be that the Board can legally refuse to license an applicant who has “trafficked” in licences in the past and who may be said not to be a *bona fide* applicant for that reason. However, in exercising its discretion with respect to the fitness of an applicant the Board must act judicially. It must not refuse the application without giving due consideration to the applicant’s denial of the allegation of unfitness against him. And this is so, in my opinion, whether the allegation follows an inquiry made by the Chief Constable or one made by the officer delegated by him for that purpose. The applicant must be allowed to explain and to support the position he takes by calling evidence, if necessary. Where the material shows that this fundamental right appears to have been violated, as here, a Court will interfere on appeal.

To refer again to the language of Lord Halsbury in *Sharp v. Wakefield*, quoted above in the passage from the *Wrights' Canadian Ropes* case, the decision must be "according to the rules of reason and justice, not according to private opinion . . . according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular."

Mr. Johnston neither denies the allegations contained in the appellant's affidavit nor quarrels with the principles just mentioned, but he says that I must not accept the language and the actions of the members of the Board as indicative of the real reason or reasons for their refusal of the appellant's application. In my opinion the argument is not sound. As I have said, the Board can choose to remain silent and give no reasons for its decision, but by so doing, in the words of the dictum of Lord Greene, it cannot defeat the appellant's appeal, and "render the right of appeal given by the statute completely nugatory".

There remains only the appellant's remedy to be considered. I was inclined at first to think that all I could legally do was refer the application back to the Board for reconsideration. However, on an appeal from the Master, a judge in chambers may make the order which he thinks should have been made on the material before him. And in *Minister of National Revenue v. Wrights' Canadian Ropes, Limited, supra*, Lord Greene said at p. 125: "The view submitted [that the matter should be referred back for further consideration] . . . if correct, would give the Minister a second opportunity of making a determination unfavourable to the respondents and thus depriving them of the fruits of their victory." That language is applicable here. The order of this Court is that the appeal is hereby allowed, that the application be referred back, but merely to enable the Board to issue the licence to the appellant, and that it be issued to him forthwith.

The Board appeared by counsel and argued against the allowance of the appeal. The appellant is entitled to his costs here.

*Appeal allowed with costs.*

*Solicitors for the applicant, appellant: Sinclair, Goodenough, Higginbottom & McDonnell, Toronto.*

## [COURT OF APPEAL.]

**Re Van Allen; The City of Hamilton v. The Children's Aid Society of Hamilton.**

*Infants — Neglected Children — Municipal Liability for Upkeep — Jurisdiction of Juvenile Court Judge — Child Made Temporary Ward before, and Permanent Ward after, Attaining Age of 16 — The Children's Protection Act, R.S.O. 1950, c. 53, ss. 1(c), (j), 7(1), (2), (7), (8), (9), 10(1), (9), 12.*

If a child has been found, before it attains the age of 16 years, to be a neglected child within the meaning of s. 1(j) of The Children's Protection Act, a judge of a juvenile court has jurisdiction thereafter to make an order under s. 7(8) committing the child permanently to the care of a children's aid society, and at the same time to make an order for payment of maintenance by the proper municipality under s. 10(1), even if the child has in the meantime attained the age of 16. While the definition of "child" in s. 1(c) of the Act is limited to a boy or girl actually or apparently under the age of 16, there is no such limitation in the definition of "neglected child" in s. 1(j), and the word "child" in that phrase is to be given its ordinary and literal meaning, *viz.*, a person under the age of 21. Section 7(9) regards an application for permanent custody of a child already found to be neglected, either before or after the expiry of a temporary custody order, as part of the proceedings brought in the first instance to have the child declared or found to be neglected, and it is to the age of the child immediately before it is found to be neglected that the limitation of 16 years applies. The power to include a provision for the maintenance of a neglected child in the order made under s. 7 is derived from s. 10, and the child with which this latter section is concerned may be over the age of 16.

AN APPEAL by the City of Hamilton from an order committing an infant permanently to the care of the respondent and declaring the appellant liable for its maintenance.

5th June 1952. The appeal was heard by HOPE, HOGG and AYLESWORTH JJ.A.

*J. T. Weir*, for the appellant: The infant in question was made a temporary ward of the respondent society under s. 7(8) (b) of The Children's Protection Act, R.S.O. 1950, c. 53, on 28th March 1951. This order expired on 27th March 1952, and the society then applied to have the child made a permanent ward. The judge of the Juvenile and Family Court then made an order under s. 7(8) (c), making the child a permanent ward and ordering us to pay maintenance for her.

At the time the permanent order was made the judge lacked jurisdiction for the reason that the child had become 16 years of age on 2nd February 1952. Section 1(c) of the Act defines "child" as "a boy or girl actually or apparently under 16 years of age", and jurisdiction to act under s. 7(8) (which, in this case, was brought into operation by the proceedings under subs. 9 of



the same section) is dependent upon the "child" being within the definition. [AYLESWORTH J.A.: Your argument is that the definition in s. 1(c) controls all sections of the Act, with the exception of the sections where the meaning of "child" is expressly extended?] Yes. Section 12 provides that a child who has been permanently committed to the care of a society remains its ward after it reaches the age of 16, but this child was not permanently committed before she reached that age—she was only a temporary ward on 27th March 1952, and when the application for permanent wardship was made she was no longer a "child" within the definition.

*Brian W. Morison*, for the respondent: It was not a new application in March 1952, but merely a continuation of the "case" in which the original order was made in March 1951. Form 5, set out in the regulations, is prescribed under s. 7(9). An order was then made under subs. 8 "permanently committing the child to the care of the Society". The order of temporary custody remained in force until the new order was made. [AYLESWORTH J.A.: Do you mean that that order did not automatically expire at the end of a year?] Yes. It is true that it was made for twelve months only, but that does not mean that it necessarily expired at the end of that time. Even if the order itself expired at the end of the twelve months, the custody did not necessarily end, but continued until the final disposition of the case under subs. 9. Under subs. 10 of s. 7 the society is entitled to exercise all the rights of a legal guardian. [AYLESWORTH J.A.: That does not mean that it is a legal guardian.] [HOPE J.A.: It is necessary to distinguish; s. 13 says that the society "shall be legal guardian", while s. 7(10) merely permits it to "exercise . . . all the rights of a legal guardian".]

Section 7(9) is imperative in its terms; if the temporary commitment has not been earlier terminated "the case *shall*" come before the judge again. A child cannot be released from the custody of a society without an order of the judge.

*J. T. Weir*, in reply.

*Cur. adv. vult.*

19th June 1952. The judgment of the Court was delivered by

HOGG J.A.:—This appeal is from an order of His Honour Judge Burbidge of the Juvenile and Family Court of the City of

Hamilton, made or purporting to have been made under the provisions of The Children's Protection Act, R.S.O. 1950, c. 53, whereby Grace Clara Van Allen, an infant, was committed permanently to the care and custody of the Children's Aid Society of the City of Hamilton, and whereby the aforesaid municipality was declared liable for the maintenance of the child and ordered to pay the sum of \$1.35 a day for such maintenance.

The learned judge who heard the application granted leave to the City of Hamilton to appeal to this Court from the order in question. The grounds of appeal are that the judge erred in holding the respondent liable for maintenance of Grace Clara Van Allen for the reason that, the said child being over the age of 16 years when the order was made, The Children's Protection Act did not confer jurisdiction upon the judge to make the order.

The problem with which the Court is confronted is a neat one involving, as was said by His Honour Judge Burbidge, the interpretation and construction of several sections of the statute.

The facts in brief are as follows: Grace Clara Van Allen, a girl born on the 2nd February 1936, was, while under the age of 16 years, brought before the aforesaid judge on the 28th March 1951, as an apparently neglected child and upon investigation by him was found to be a neglected child.

The notice commencing the proceedings, which is in the terms of Form 1 under the Regulations made by authority of s. 41 of the Act, sets out that the Children's Aid Society of the City of Hamilton would apply to the judge of the Family Court of the said city on the 28th March 1951 to ascertain whether Grace Van Allen was a neglected child and, if she was so found would apply for an order respecting her custody. An order was made, of the same date, that the child be temporarily committed to the care of the respondent society for a period of twelve months. On the 28th March 1952, which was immediately before the expiration of the original order made on the 28th March 1951, the learned judge made an order that the child be committed permanently to the custody of the respondent society and that the City of Hamilton should contribute towards her maintenance the sum of \$1.35 per day. It is from the latter part of this order that this appeal is taken.

It is trite to say that the powers to be exercised by the judge of the juvenile court when dealing with matters that are the

subject of The Children's Protection Act are limited to such as are conferred upon him by that statute.

Section 1(c) of the Act reads: "'child' means a boy or girl actually or apparently under 16 years of age".

Section 1(j) defines the words "neglected child".

Section 7 declares certain powers which may be exercised by the judge. The portions of this section which are material to the consideration of this appeal are as follows:

"(1) A constable or other police officer, or a person authorized under section 6 to act as a probation officer may apprehend without warrant and take to a place of safety any apparently neglected child.

"(2) The child shall be returned to his parents or guardians or be brought before the judge for examination within one week after apprehension, and the judge shall investigate the facts of the case and ascertain whether the child is a neglected child and his age, and the name, residence and religion of his parents. . . .

"(7) Pending the hearing or determination of any such case the judge may make such order for the temporary custody and care of the child as he may deem proper.

"(8) If the judge finds the child to be a neglected child he may make an order,

"(a) that the case be adjourned *sine die* and that the child be returned to his parent or guardian or other person in whose charge he may be, subject to inspection and supervision by the children's aid society;

"(b) that the child be temporarily committed to the care and custody of the children's aid society for such specified period as in the circumstances of the case he may deem necessary, provided that such period shall not exceed 12 months; or

"(c) that the child be committed permanently to the care and custody of the children's aid society.

"(9) . . . where a child has been temporarily committed to the care and custody of the society, the society may at any time during the period of temporary commitment bring the case again before the judge for further and other consideration and action under this section, and if the temporary commitment has not been earlier terminated, the case shall, at the expiration of the specified period, again come before the judge and the judge shall thereupon further inquire and determine whether the



circumstances justify an order returning the child to the parent or guardian or making a further order under subsection 8."

The definition of the word "child" in the interpretation clause, s. 1(c) of the statute, limits or restricts the age to under 16 years. Although the circumstances which must be associated with a child before he or she can be found to be a neglected child are set out in s. 1(j), which defines the meaning of the words "neglected child", no limitation with respect to age appears in the definition.

It is to be observed that s. 7 of the statute is concerned with "any apparently neglected child" and the section provides that "If the judge finds the child to be a neglected child he may make an order" under clauses *a*, *b* or *c* of subs. 8 of s. 7 of the Act, with respect to the care and custody of such child, and such order shall name the municipality liable for the child's maintenance as provided by subs. 12 of s. 7.

Before the child has been found to be a neglected child, this section of the statute is concerned with a child under 16 years of age. The question to be determined, expressed in its briefest terms, is whether such restriction as to age can be held to apply after the child has been found to be a neglected child.

There are certain rules of construction which I think are applicable and to which effect should be given. An Act of Parliament or of the Legislature may contain certain general enactments relating to the whole subject-matter of the statute and also contain specific enactments relating to certain special matters with which it is concerned.

It was said by Romilly M.R. in *Pretty v. Solly* (1859), 26 Beav. 606 at 610, 53 E.R. 1032, that: "The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

In a discussion of the effect of the interpretation clause contained in a statute, Craies on Statute Law, 4th ed. 1936, at p. 195\*, says: "Another important rule with regard to the effect of an interpretation clause is, that an interpretation clause is not to be taken as substituting one set of words for another,

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\*See now 5th ed. 1952, p. 200. ED.

or as strictly defining what the meaning of a term must be under *all* circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended."

It is of interest to observe that in earlier days the inclusion of interpretation clauses of wide scope in statutes was not regarded with complete deference by the Courts. Lord Denman, Lord Chief Justice of England, in *Regina v. The Justices of Cambridgeshire* (1838), 7 A. & E. 480 at 491, 112 E.R. 551, said:

"But we apprehend that an interpretation clause is not to receive so rigid a construction; that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of the word must be under all circumstances. We rather think that it merely declares which persons may be comprehended within that term, where the circumstances require that they should. We cannot, however, refrain from expressing a serious doubt whether interpretation clauses of so extensive a range will not rather embarrass the Courts in their decision than afford that assistance which they contemplate. For the principles on which they are themselves to be interpreted may become matter of controversy; and the application of them to particular cases may give rise to endless doubts."

Section 7 of the statute is concerned with the necessary steps to be taken to have an apparently neglected child found to be a neglected child and, when it is so found, to arrange for the neglected child's custody. The child referred to in subs. 8 of s. 7 of the Act is a neglected child so found. In my view of the matter, the definition of the word "child" contained in s. 1(c) of the Act is to be regarded as a general enactment with respect to this word, while the definition of a "neglected child" by s. 1(j) is in the nature of a special enactment. The general definition set out in s. 1(c) is to be held to apply to and affect the other parts of the statute to which it may properly be applied. The word "child" in the phrase "neglected child" is to be given its ordinary and literal meaning.

In *In re Township of Sandwich East and The Windsor and Tecumseh Electric R.W. Co.* (1908), 16 O.L.R. 641, 8 C.R.C. 145, it was said that the word "child" is ordinarily a synonym for the word "infant", a person under the age of 21 years. Section 13

of the Act speaks of the legal guardian of a child until it has attained the age of 21 years.

The conditions precedent which must be present in order that jurisdiction may be exercised by the judge to make the orders set out in subs. 8 of s. 7, are: (1) that when the child is brought before the judge in the first instance, it is a child not exceeding 16 years of age, (2) that such child is found by the judge to be a neglected child. Both of these conditions were fulfilled in the present case.

In *Re Giles*, [1939] O.W.N. 346, [1939] 4 D.L.R. 415, it was said that at the moment the child in question is a neglected child within the meaning of the Act, the judge has jurisdiction to pronounce any one of the three orders mentioned in subs. 8 of s. 7 of the statute. In that case there was no question in issue that depended upon the age of the child: see the judgment of Masten J.A.

There are several other sections of the Act which are material.

Section 12 sets out: "For the purposes of sections 10 and 11, 'child' includes a boy or a girl over the age of 16 years of whom a children's aid society is the legal guardian under this Act."

Section 10 deals with the subject of maintenance of a child in the custody of a children's aid society and a consideration of the terms of this section throws much light upon the subject under discussion. Subsection 1 reads in part: "In any direction for the temporary custody and care of a child pending the hearing or determination of the case, the judge may order, and when committing a child to the custody or control of a children's aid society the judge shall order the payment by the corporation of the municipality to which the child belongs of a reasonable sum. . . ."

Subsection 9 provides that: "At any time after the commitment of the child to the care and custody of the children's aid society, the society may apply to the judge for an order for the payment of such additional maintenance as he may deem just."

In an order for temporary custody of a child the judge may, and in an order for permanent custody he shall, order payment by a municipality for maintenance of the child.



It is the order for custody made under s. 7(8) to which reference is made in s. 10(1). Subsection 9 of s. 10 speaks of the commitment of a child to the custody of a children's aid society, that is to say, the commitment to custody under s. 7.

The power to include a provision for the payment by a municipal corporation of a sum of money per day for the maintenance of a neglected child, in the order made under s. 7 for the care and custody of such child whereby the children's aid society is made the child's legal guardian, is derived from s. 10 and the child with which this latter section is concerned may be over 16 years of age.

Section 10 clearly gives jurisdiction to the judge to include in an order contemplated by s. 7(8), committing a child permanently to the children's aid society and making the society the legal guardian, a further order for the payment of a sum of money for the maintenance of a neglected child and at this time such child may, by virtue of s. 12, be over the age of 16 years. This section is commented upon by my Lord the Chief Justice of Ontario in *The Children's Aid Society of the County of Ontario v. The Town of Trenton*, [1940] O.W.N. 207 at 209, [1940] 3 D.L.R. 101, 74 C.C.C. 92.

Turning now to another aspect of the case, the transcript of the proceedings upon the application made on the 28th March 1952 for an order of permanent custody, shows that all parties regarded the application as a renewal of the proceedings instituted on the 28th March 1951, when the matter was brought *ab initio* before the juvenile court judge and when the child Grace Clara Van Allen was under the age of 16 years. There could be no question as to the jurisdiction of the judge on the 28th March 1951 to make the order for temporary custody, because of any difficulty arising due to the child's age. Section 7(9), the material part of which I have already quoted, sets out that when the temporary commitment has been earlier terminated, "the case" may be brought before the judge and at the expiration of the specified period, if not earlier terminated, "the case" shall again come before the judge. It is not a new "case" that comes before the judge; it is the case commenced in March 1951 to which the subsection refers. The fact that Grace Clara Van Allen became 16 years of age on the 2nd February 1952, some 53 days before the temporary order expired, did not

put an abrupt end to the proceedings already instituted before she had reached that age. To hold this would, I think, not only be contrary to the terms of the subsection but would render null the object of the statute, which is directed to the continuing custody and welfare of a child found to be neglected.

Section 7(9) regards the application for an order directed to the permanent custody of a child already found to be a neglected child, made either before or after the expiry of a temporary custody order, as part of the proceedings brought in the first instance to have the child declared or found a neglected child and to have a temporary custody order made. It is the age of the child immediately before he or she is found to be a neglected child to which the limitation of 16 years applies.

I have, perhaps, discussed the question involved in this appeal at greater length than may be necessary but this fault was occasioned by a consideration of the difficulties which would arise if the jurisdiction of the judge were limited in the manner urged by the appellant.

I am of the opinion that the learned Juvenile Court Judge was right in holding that he had jurisdiction to make the order in question in this appeal and I would dismiss the appeal.

*Appeal dismissed.*

*Solicitor for the appellant: A. J. Polson, Hamilton.*

## [COURT OF APPEAL.]

**Brennan Paving Company Limited v. The City of Oshawa.**

*Building Contracts—Interpretation and Application—Payments to be Made on Certificate of Engineer—Dual Nature of Engineer's Functions—Duty to Act Judicially in Certifying—Effect of Failure in this Duty—Estoppel.*

If a building contract provides that the work shall be done under the supervision of an engineer appointed by the owner, and that payments shall be made only on the engineer's certificate, the engineer occupies two distinct positions, the first one as agent of the owner under the contract, and the second a quasi-judicial one as certifier between the parties. The two positions are distinct and separate, different duties attach to them and different consequences flow from the performance or breach of those duties. Under the law of principal and agent he may, within the scope of his duties, bind his principal. As certifier deciding between the parties he must act judicially. *Hickman & Co. v. Roberts et al.*, [1913] A.C. 229, applied. To act judicially as certifier requires him, when occasion arises, to consider and give effect to any conduct on his part as agent *vis-à-vis* the contractor which has bound the owner as his principal to the advantage of the contractor, and in this connection he must act *qua* certifier as independently as if some other person had been the owner's agent. If he fails to consider and give effect to such conduct, he fails to act judicially, and the contractor is then freed from the contractual necessity for having the engineer's certificate as a condition precedent to the right to payment. It is not necessary that the engineer's conduct should be such as to amount to fraud or undue collusion with the party employing him; it is enough in this connection if it is such that it would be inequitable to require compliance with the condition precedent. *Sharpe v. San Paulo Railway Company* (1873), L.R. 8 Ch. 597, applied.

If the engineer is given, under the contract, the sole right to interpret the plans and specifications, and he does anything to lead the contractor to understand, or to confirm the contractor's understanding, that these plans and specifications are to be interpreted in one way rather than another, he, and through him the owner, will be estopped from later placing a different interpretation on them. If, in certifying the contractor's accounts for payment, he insists upon doing so according to this other interpretation, this will constitute a failure to act judicially, and will be sufficient to make it inequitable to insist upon certification as a condition precedent to payment.

Judgment of McRuer C.J.H.C., [1952] O.R. 540, affirmed.

AN APPEAL by the defendant from the judgment of McRuer C.J.H.C., [1952] O.R. 540, [1952] 4 D.L.R. 181, in favour of the plaintiff.

3rd to 6th February 1953. The appeal was heard by ROACH, HOGG and GIBSON JJ.A.

*T. K. Creighton, Q.C.*, for the defendant, appellant: This was an unusual contract; it was a "unit price" contract in which there was no stated amount of work to be done and no stated amount to be paid. The contract was to be supervised by the City's engineer and his certificate was a condition precedent to the plaintiffs right to payment. The contract is clear and explicit on this point.



The Courts can go behind such a contract only if there are special circumstances, such as fraud, collusion or undue influence amounting to collusion: *Farquhar et al. v. City of Hamilton et al.* (1892), 20 O.A.R. 86 at 95. There was no evidence of anything of that kind here.

We made a contract for a particular road; we did not want a different one, and we did not want to pay more than that kind of road called for. There is no duty on us or our engineer to police the contract and keep the contractor within the specifications. The contract expressly provided that variations were to be made only on the written instructions of the engineer. The use of extra materials might be for any number of reasons, *e.g.*, carelessness. The contractor was given distinct instructions as to the excavation.

When a certificate is required, as here, the giving of that certificate is a condition precedent to payment: Hudson on Building Contracts, 6th ed. 1933, p. 244, citing *Morgan v. Birnie* (1833), 9 Bing. 672, 131 E.R. 766. I refer also to *Sharpe v. San Paulo Railway Company* (1873), L.R. 8 Ch. 597; *Scott v. Liverpool Corporation* (1859), 28 L.J. Ch. 230 at 238; *De Worms (Baron) v. Mellier* (1873), L.R. 16 Eq. 554; *Eaglesham v. McMaster*, [1920] 2 K.B. 169; *Scott v. Avery* (1856), 5 H.L. Cas. 811, 10 E.R. 1121; 3 Halsbury, 2nd ed. 1931, p. 241, para. 417; *Kemster et al. v. The Bank of Montreal* (1871), 32 U.C.Q.B. 87; *Patterson et al. v. The Great Western Railway Co.* (1859), 9 U.C.C.P. 229; *Jarvis et al. v. Dalrymple* (1854), 11 U.C.Q.B. 393; *Ardagh et al. v. The City of Toronto* (1886), 12 O.R. 236; *Ekins v. The County of Bruce* (1870), 30 U.C.Q.B. 48; *Taylor Construction Co. v. Town of Georgetown* (1926), 30 O.W.N. 136; *Canty v. Clarke et al.* (1879), 44 U.C.Q.B. 505; *Robinson v. The Town of Owen Sound* (1888), 16 O.R. 121.

As to the finality of the engineer's certificate when given, I refer to Hudson, *op. cit.*, 6th ed. 1933, p. 268, and 7th ed. 1946, p. 279. In the later edition one condition is added to the eight already set out in the 6th; compare Halsbury, 2nd ed., p. 248, para. 435.

G. K. Drynan, for the defendant, appellant: I refer to Hudson, *op. cit.*, 6th ed., pp. 256-7, as to the effect of progress certificates. [ROACH J.A.: Do you suggest that, having given four progress certificates, the engineer had not thereby in effect

approved the way the contractor was doing the work?] I do; the whole matter is to be adjusted at the time of the final certificate.

Further, the engineer is a mere certifier, and not an arbitrator: 3 Halsbury, 2nd ed., p. 242, para. 419; Hudson, *op. cit.*, pp. 243, 501; *Sharpe v. San Paulo Railway Company*, *supra*, at p. 609. Since the engineer was not an arbitrator, the trial judge was wrong in holding that he was required to act judicially.

The engineer himself did not make the changes in the requirements; they were authorized by a subordinate, who had no authority to bind the City: *Jones and Simpson v. The Queen* (1877), 7 S.C.R. 570 at 599-602; *Robinson v. The Town of Owen Sound*, *supra*, at p. 126; *Munro v. The Town of Westville* (1903), 36 N.S.R. 313 at 322-4; *Sorette et al. v. The Nova Scotia Development Co.* (1898), 31 N.S.R. 427 at 430; *Courtney v. The Provincial Exhibition Commission* (1906), 41 N.S.R. 71 at 80-1, 2 E.L.R. 226.

Additional quantities of materials, if authorized at all, can only be authorized in writing: Hudson, *op. cit.*, p. 309; *Munro v. The Town of Westville*, *supra*.

*Peter Wright*, for the plaintiff, respondent: Our submission is that where a contractor does all that he is required to do to obtain a certificate under such a contract as this, and the engineer withholds the certificate on an honest but erroneous view of the contract, the contractor is relieved from the necessity for obtaining the certificate and can recover without it: *Panamena Europea Navigacion (Compania Limitada) v. Frederick Leyland & Company Limited (J. Russell & Company)*, [1947] A.C. 428 at 433; *Sharpe v. San Paulo Railway Company* (1873), L.R. 8 Ch. 597 at 609; *Peters et al. v. The Quebec Harbour Commissioners* (1891), 19 S.C.R. 685; *Hickman & Co. v. Roberts et al.*, [1913] A.C. 229. [ROACH J.A.: But in that case there was no independent attitude of mind, and that is not the case here.] At p. 234 Lord Alverstone referred to "judicial conduct", and the learned trial judge has found in this case that the engineer did not act judicially. [ROACH J.A.: Then your argument is that collusion, fraud or absence of judicial conduct may all relieve the contractor from the necessity for having a certificate?] Yes; I refer to the comment on the case in Hudson, *op. cit.*, 7th ed., p. 288. The extent and limits of the engineer's duty are for the Court to decide: the *Panamena* case, *supra*, at p. 434.

*P. B. C. Pepper*, for the plaintiff, appellant: My three submissions are: (1) that the learned trial judge was right in his conclusions; (2) that the law is conclusively settled by the *Panamena* case; and (3) that the parties' agreement was that weight of materials should be the governing factor, and this agreement could not be changed by the engineer.

*T. K. Creighton, Q.C.*, in reply: The *Panamena* case, when properly read, supports my position. Jurisdiction is not in this Court to determine the amount of materials for which the contractor should be paid; it is in the engineer, and his certificate remains a condition precedent. There has been no change in the law; the latest case I have found is *Neale v. Richardson*, [1938] 1 All E.R. 753.

As to the absence of authority in the supervising engineer, as opposed to Meadows, to authorize any departure from the specifications, I refer to *Re The Rio de Janeiro Flour Mills and Granaries and De Morgan, Snell and Co.* (1891), 8 T.L.R. 108.

*Cur. adv. vult.*

30th April 1953. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal from a judgment pronounced by McRuer C.J.H.C. following the trial of this action by him without a jury.

The plaintiff's claim is to recover a balance alleged to be owing to it under two contracts covering, *inter alia*, the re-building of the roadway on Simcoe Street in the city of Oshawa.

The particulars of the plaintiff's claim are as follows:

|                                                    |            |
|----------------------------------------------------|------------|
| 1. 648.59 tons of gravel at \$2.15 per ton.....    | \$1,394.46 |
| 2. 782.195 tons of asphalt at \$8.15 per ton ..... | 6,374.89   |
| <hr/>                                              |            |
| Total .....                                        | \$7,769.35 |

The trial judge awarded the plaintiff judgment for the amount claimed and costs.

The defendant pleaded that it was liable only for such amounts as were certified by the engineer as owing; that the engineer had refused to certify the balance now claimed by the plaintiff; and that under the terms of the contract the decision of the engineer was final and binding on the parties.

The first contract is dated 24th July 1945, the second 3rd June 1946. The plaintiff's claim for gravel arises out of the second contract only; its claim for asphalt arises out of both.



The first contract covered the whole distance on Simcoe Street that was originally intended to be, and was in fact, rebuilt. That section extended from an intersection some distance north of King Street to an intersection some distance south of King Street. While the work was in progress under that contract it was decided to vary in part the nature of the construction south of King Street and the second contract covered that portion of the work.

In his reasons for judgment the learned trial judge has set out relevant portions of both contracts, the general conditions, specifications and other relevant documents. I would like to avoid repeating them, but, if my reasons are to be understandable without referring back to the reasons of the learned trial judge, it seems to me that I must at least repeat some of them.

The form of tender originally supplied by the defendant and completed by the plaintiff listed the estimated quantities of material that would be required for the whole job and the plaintiff's tender was on a unit basis.

For asphaltic concrete wearing-surface the plaintiff's tender was \$8.15 per ton. That price included the incorporation of that material into the work.

The original contract provided, in part, as follows:

"THE SAID CITY covenants with the said Contractors that if the said work, including all extras in connection therewith, shall be duly and properly executed as aforesaid, and if the said Contractors shall observe and keep all the provisoes, terms and conditions of the said Contract, they, the said City, will pay the said Contractors therefor the sum of \$112,282.32 (more or less) according to the schedule of unit prices in the Form of Tender, upon Estimates or Certificates signed by the Engineer.

"PROVIDED THAT no money shall become due or be payable under this Contract unless and until an Estimate or Certificate therefor shall have been signed by the Engineer as herein provided, the possession of which is hereby made a condition precedent to the Contractor's right to be paid or to maintain any action for such money or for any part thereof."

By the terms of the original contract, the plans, specifications and general conditions are made a part thereof as though embodied therein and the plans and specifications include the information to bidders.

In the information to bidders there is the following:

“It is proposed to remove all of the present asphaltic and tar surface from the existing base, which is believed to be 6” in depth of concrete, and also to remove all of the brick paving, street car rails, ties and inter-spacing concrete. It is then proposed to fill the space formerly occupied by the ties with compacted asphaltic concrete base course, and also to build up the shoulders of the present concrete base with the same material, after which it is proposed to spread the consolidated asphaltic concrete wearing surface, varying the thickness from 1” to 2”. In making this consolidation of the asphaltic concrete wearing surface, it is proposed that the engineer should set grades at intervals not exceeding 50 feet, which will effect a parabolic cross sectioned contour on the finished pavement.

“Attention is drawn to the fact that this contour must be carefully followed, in order to strengthen the bearing value of the pavement, and in order to partially eliminate the excessive crown which is apparent on the existing street.”

The specifications contain the following:

“CONCRETE BASE COURSE:

“Immediately after a section of concrete has been deposited in place, the general contour shall be struck by means of an approved template. The means of supporting the templates shall be such as to produce a uniform surface true to lines and levels and all requirements of these specifications . . .

“The contractor, at his expense, shall provide and operate, as directed by the Engineer, such straight edges, templates, strike boards and other devices as are necessary to make and inspect the surface of the finished sub-grade, pavement or other finished surface. . . .

METHOD OF PAYMENT:

“All hot-mix, hot-laid asphalt mixtures supplied and incorporated into the work will be paid for at the price tendered per ton.

“The Owner will provide and place a man at the Contractor’s weigh scale for the purpose of weighing the mixtures incorporated into the work, and the net weights so determined will be the only basis for payment.”

Both parties, however, later agreed that the municipal weigh-scales should be used for weighing material that went into the work. One weigh-ticket was given by the weighmaster to the

truck-driver employed by the plaintiff and a duplicate was retained by the weighmaster for the defendant.

The specifications covering the "Asphaltic Concrete Surface Course" contain the following:

"The surface course shall consist of coarse aggregate sand and mineral filler uniformly mixed with asphalt cement and shall be laid upon the previously prepared pavement base to a minimum thickness of one inch and a maximum finished depth of two inches, as directed by the Engineer."

The work commenced some time in August 1945 at the north end of Simcoe Street, and was continued until the late fall of that year when it was discontinued by reason of weather conditions. At the time of such discontinuance, the work had been completed to within two blocks of King Street.

The original specifications had been prepared by one Reid as consulting engineer for the defendant, and all the work that was done in 1945 was done under the supervision of one Miller, an engineer, who was a permanent employee of the defendant, and who acted as supervising engineer on that part of the job.

Upon the commencement of work south of King Street in the spring of 1946, it was found, upon removing the asphaltic surface, that the concrete sub-base was not 6 inches thick, as had been believed when the original specifications were prepared. On account of these unexpected conditions, the type of construction on that part of the work was changed.

For some reason not made apparent at the trial, Reid and Miller retired from their positions, and the engineering firm of Meadows, Critoph & Co. were appointed by a resolution of the city council dated 15th May 1946, and their duties, according to the evidence, were "to draw specifications, to advise on tender, supervise the work, compute the quantities, examine and certify contractor's application for payment and give final acceptance of work". As I read the evidence, their jurisdiction extended only to that part of the job south of King Street.

Messrs. Meadows, Critoph & Co. prepared new specifications covering the area south of King Street. The scope of the work is therein described as follows:

"Remove existing concrete base.

"Excavate the material thereunder to a depth to provide a 6" crushed gravel base course and new concrete sub-base 8" thick and a minimum of 3" binder and asphaltic top.



“Provide 6” crushed gravel base course and 8” concrete base and a minimum of 2” of asphaltic binder and 1” of asphaltic top.”

Those specifications also provide that: “The General Conditions of the Original Contract shall apply to this enlargement of the Original Contract.”

Other relevant provisions contained in those specifications are as follows:

“The contractor shall supply all tools, plant, equipment and labor and shall break up and remove the existing concrete base from the edge of the gutter to the end of the track ties on both sides of the street. He shall remove the material thereunder to a depth of 16” below the top surface of the existing concrete gutter on one side and to a depth of 14” below the top surface of the wood ties on the other side and dispose to a convenient dump within 1,000 yards of the site.

“Immediately following the excavation a preliminary rolling shall take place by a self-propelled roller weighing not less than ten tons.

“Following this rolling, any soft or spongy areas, deemed by the engineer to be unstable shall be excavated to a depth designated by the engineer and this unsuitable material disposed of to a convenient dump within a thousand yards of the site. Into such special excavations below finished sub-grade suitable concrete rubble coming from the excavations in advance of the preparation of sub-grade shall be placed and tamped.

“Basis of payment for this item in cubic yards of excavation as determined by the Engineer. . . .

“Preliminary to laying the first course of the gravel the sub-grade shall be thoroughly rolled to the satisfaction of the engineer, by a self-propelled roller weighing not less than ten tons. Also prior to the application of the first layer of the crushed gravel the engineer must be satisfied that the sub-grade conforms to the elevations detailed above within limit of variation of  $\frac{1}{4}$ ”. . . .

“Basis of payment for this material shall be per ton, all material being weighed on the city scales by the city weigh-master and checked on the job by the inspector designated by the engineer. Weigh tickets in duplicate shall be furnished by the city weigh-master, one of which is retained by the inspector.”

Under date 15th May 1946 the plaintiff tendered on that part of the job "according to the plans and specifications of Messrs. Meadows, Critoph & Co." at unit prices as follows:

| Item | Description                                                   | Quantity           |        |
|------|---------------------------------------------------------------|--------------------|--------|
| 1.   | Removal of existing concrete base and the material thereunder | 1250 c.y. concrete | 5.00   |
| 2.   | Crushed gravel base course                                    | 3150 c.y. material | 2.10   |
| 3.   | Concrete base                                                 | 2500 c.y.          | 11.22. |

It should be observed that there was no tender covering asphaltic binder or asphaltic top.

That tender was accepted by the council of the defendant corporation on 15th May. The second contract dated 3rd June 1946 was then prepared but it was not executed until some time after 5th July. It recites, *inter alia*, the original contract, the changes and additional work in that part of the job south of King Street "in accordance with the plans, specifications and general conditions prepared by Meadows, Critoph & Co.", and that this additional work has been entered upon and is being carried out. By that agreement the plaintiff covenanted and agreed to do the whole of the works therein mentioned together with the original works set out in the agreement of 24th July 1945, in so far as the same had not already been completed, "in strict accordance with the provisions of the said original Agreement of July 24th, 1945, and with the plans, specifications and general conditions therein referred to and attached hereto (which are identified by the signature of the Contractors and are made part of this contract as if embodied herein) except as modified or amended in this agreement or in the said original agreement".

The defendant covenanted to pay "upon estimates or certificates signed by the Corporation's Engineer". The agreement contained this proviso:

"And provided further that this agreement shall be read and construed with the said original Agreement of the 24th day of July, 1945, and shall be considered to be an amendment and extension thereof, it being hereby declared that it is the Agreement of the Parties hereto that all of the terms of the said original Agreement shall apply, except as hereby amended, to this agreement; and without limiting the generality of the foregoing, it is agreed in particular that all terms of the original

contract relating to progress payments on account of the said contract shall apply . . .”

The asphaltic binder and asphaltic top were to be paid for at the tonnage rates contained in the first contract.

The plaintiff continued with the work. Mr. Meadows was the member of the engineering firm in charge of this job. He himself took very little part in supervising or directing it. His office was in Toronto and he attended at the job in Oshawa only about once each week, usually on Saturday. He appointed one Buraglia as supervising engineer and one Courtlee as inspector.

Over the whole length of Simcoe Street, which was rebuilt under both contracts, neither the original engineers nor Mr. Meadows nor Buraglia set out stakes giving the levels and contours. The floor of the gutters was taken as the base level and the wearing surface was laid on a contour that would provide proper drainage to the gutters. The total length of the work south of King Street was 4,000 feet. The gutters were irregular and at various places dilapidated. There was a total of 2,239 lineal feet of curb and gutter reconstructed south of King Street.

When the original concrete base was removed and the area below it was rolled, it was found that there were certain soft spots, the possibility of which had originally been anticipated. Rubble was put into these soft spots in accordance with the provisions of the specifications, but due to the irregular shapes and sizes of the broken concrete which constituted the rubble there were voids in it after it had been deposited. These were brought to the attention of Mr. Meadows by Buraglia, and Mr. Meadows then gave instructions to fill up the voids by using crushed gravel.

All the asphaltic mix that went into the whole job, both north and south of King Street, and all the gravel that went into that part of the job south of King Street was weighed over the city scales and the plaintiff's claim in this action is for the balance of that tonnage.

Up to the fall of 1945 three progress certificates had been issued to the plaintiff by the former engineer and the amounts thereby certified had been paid. By the time the plaintiff had finished the work south of King Street three certificates had been issued by Meadows and the amounts certified thereby had been paid. The plaintiff then applied for a final certificate. Mr. Meadows refused to issue a certificate on the basis of the



weights of the asphaltic mix and the gravel. The reason given by him for refusing a certificate on that basis was that, on the area south of King Street, the contractor had laid down a greater thickness of asphaltic wearing-surface and had put more gravel into the job than was called for by the specifications.

Mr. Meadows then computed the area of the asphaltic surface south of King Street and, on the "theory" that according to the specifications it should have a uniform thickness of 1 inch, he computed the weight of the asphaltic mix, which he said was the limit that should have gone into the asphaltic wearing-surface according to those specifications. He got that total weight on the basis that a square yard by a thickness of 1 inch would weigh 160 pounds.

As to the gravel, instead of using the actual weights as the basis of payment, he calculated the weight of the total cubic yards that in his opinion should have been used.

On those bases the engineer issued his final certificate.

It is for the difference in weight at the relevant prices per ton between the actual tonnage that went into the job and the tonnage for which it has been paid, that the plaintiff now claims in this action. It will now be understood that the refusal of Mr. Meadows to issue a certificate for the amount now claimed was based solely on the contention that the contractor had used more asphaltic surface-mix and more gravel than the specifications prescribed.

It is most important, in my opinion, that, on the evidence which the trial judge accepted, never at any time during the whole course of construction was any complaint or criticism communicated by either Meadows or Buraglia to the plaintiff, either as to the quantity of gravel or asphaltic surface-mix which it was incorporating into the job or with respect to the method or procedure used by the plaintiff in arriving at the finished levels or contours.

Where, as here, the engineer's certificate is a condition precedent to payment, the engineer occupies two positions: first, one as agent of the owner under the contract; second, a quasi-judicial position as certifier between the parties: Hudson on Building Contracts, 7th ed. 1946, p. 286. The two positions are distinct and separate. Different duties attach to them and different consequences flow from the performance or breach of those duties. Under the law of principal and agent he may,

within the scope of his duties, bind his principal. As certifier deciding between the parties he must act judicially: *Hickman & Co. v. Roberts et al.*, [1913] A.C. 229. To act judicially as certifier requires him, where the question arises, to consider and give effect to any conduct on his part as agent *vis-à-vis* the contractor which has bound the owner as his principal to the advantage of the contractor. In this connection he must act *qua* certifier as independently as if some other person rather than himself had been the agent of the owner under the contract. All that seems crystal-clear to me.

The issues in and the circumstances of this case require that we inquire into the conduct of the engineer first as agent and second as certifier. If as agent he bound his employer to the advantage of the contractor in relation to this dispute, and if as certifier he has failed to consider and give effect to that conduct, then he has not acted judicially. If he did not act judicially, then the plaintiff was freed from the contractual necessity for having the engineer's certificate as a condition precedent to the right to payment.

In *Sharpe v. San Paulo Railway Company* (1873), L.R. 8 Ch. 597, Mellish L.J., at p. 612, stated the law to be as follows: "Wherever, according to the true construction of the contract, the party only agrees to pay what is certified by an engineer, or what is found to be due by an arbitrator, and there is no agreement to pay otherwise—that is to say, in every case where the certificate of the engineer or arbitrator is made a condition precedent to the right to recover, there the Court has no right to dispense with that which the parties have made a condition precedent, unless, of course, there has been some conduct on the part of the engineer or the company which may make it inequitable that the condition precedent should be relied upon. If nothing of that sort has happened, then the parties are bound by that which they have made a condition precedent."

In the same case, Sir W. M. James L.J., dealing with the same subject, said, at p. 609: "I myself should be very loath to interfere with any such stipulation upon any ground except default or breach of duty on the part of the engineer."

Counsel for the appellant submitted that where, as here, the possession of the certificate of the engineer is a condition precedent to payment the Court can dispense with such a certificate only where there has been fraud on the part of the engineer or

undue collusion between him and the party employing him. That fraud and undue collusion constitute sufficient reasons there can be no doubt, but to say that they are the only reasons that justify the interference of the Court is to place too narrow an interpretation on the language of Mellish L.J. quoted above. There may be conduct on the part of the engineer not amounting to wilful fraud or collusion that would make it inequitable that the condition precedent be complied with. There may be—to adopt the language of Sir W. M. James, *supra*—default or breach of duty on the part of the engineer.

I deal first with the conduct of the engineer as it relates to the asphaltic top.

The general conditions which were applicable to the first contract are by the terms of the second contract also made applicable to it. One of those conditions is as follows:

“Work mentioned on the plans or specifications shall be performed as though shown on both. In the event of dispute, the decision of the engineer as to the meaning or intent of the plans and specifications shall be final.”

I have already pointed out that in the original information to bidders the scope of the work was defined as including the spreading of the consolidated asphaltic concrete wearing-surface, varying the thickness from 1 inch to 2 inches and that the specifications covering the asphaltic concrete surface-course called for “a minimum thickness of one inch and a maximum finished depth of two inches as directed by the engineer.”

The specifications as prepared by Mr. Meadows described the scope of the work as including a “minimum of 2” of asphaltic binder and 1” of asphaltic top”.

Mr. Meadows prepared a plan (ex. 17) showing a cross-section of the finished roadway south of King Street. It is entitled “Suggested Typical Cross Section”. It shows definite thicknesses as follows: “6” new crushed gravel base, 8” new concrete base, 2” asphaltic binder course”, and “1” asphaltic top”. That plan makes no reference to any minimum or maximum thicknesses. Since the specifications called for “a minimum of 2” of asphaltic binder and 1” of asphaltic top”, it seems to me that there is some conflict between the “suggested” plan and the specifications. The specifications, while calling for a minimum, are silent as to any maximum. In that respect Meadows’s specifications differed from those prepared by Reid.



Meadows, in his evidence, interpreted the specifications as permitting, by implication from the use of the word "minimum", a thickness of asphaltic binder greater than 2 inches. According to his evidence there was to be no definite maximum thickness of that course. Where necessity required, it could exceed 2 inches. He thereby agreed that to that extent at least there was a conflict between the plan and the specifications. He would not agree that there was any conflict between the two as to the thickness of the asphaltic top. It was to have a thickness of 1 inch, no more, no less.

In executing the work south of King Street the plaintiff continued the practice it had followed north of King Street as far as the asphaltic wearing-surface was concerned. It laid a minimum thickness of 1 inch across the whole width of the street and on the outside portions a maximum not exceeding 2 inches and between that minimum and the maximum the thickness varied as the level of the gutters varied. In following that practice south of King Street it had not only the tacit approval of the inspector Courtlee; he specifically instructed it.

As to the meaning and effect of the plans and specifications, the defendant's case is this: the engineer Meadows's decision as to their meaning is final; he interprets them as calling for no more and no less than 1 inch of asphaltic wearing-surface; the inspector Courtlee had no authority to vary them; if the plaintiff laid a thickness in excess of 1 inch it did so at its own risk and the defendant is under no obligation to pay for the excess.

The answer to those contentions is that *during the progress of the work* there was no dispute between the plaintiff and Meadows as to the thickness of the asphaltic wearing-surface called for by the plans and specifications. The plaintiff's interpretation of the plans and specifications as they related to that item differed from the interpretation Meadows now says he intended they should bear, but the parties were not disputing about it. The plaintiff did not know that there was any difference between their respective interpretations. The plaintiff's superintendent on the job interpreted "minimum" as qualifying both the "2" of asphaltic binder" and the "1" of asphaltic top". The plan (ex. 17) he interpreted as showing only a "suggested typical cross section". It contained no reference to and made no allowance for the variations in the levels of the gutters. He concluded, and in my opinion not unreasonably, that this "sug-

gested" plan would have to yield to the physical conditions with which he was confronted on the job consisting of those variations. That the plan was intended so to yield, he thought, was confirmed by the specifications. He proceeded with the work on that understanding.

It must be conceded that it was the engineer's function under the general conditions to decide the meaning and intent of the plans and specifications. The Court, however, may inquire and determine whether, during the progress of the work, the engineer, by his conduct or otherwise, led the plaintiff to understand, or confirmed the plaintiff in the understanding of its superintendent, that the plans and specifications permitted a thickness of asphaltic top in excess of 1 inch. If the engineer or those for whom he was responsible, by his or their conduct or otherwise, did either of those things, then he and through him the defendant is estopped from now placing a different interpretation on them.

Meadows saw the plaintiff proceeding with the work in compliance with the understanding of its superintendent, but never communicated any objection to the plaintiff. At the trial Meadows stated that on one occasion he objected and in substance warned the superintendent against laying down a greater thickness than 1 inch of asphaltic wearing-surface. The superintendent in his evidence denied any such discussion and the trial judge accepted the superintendent's evidence.

Meadows must have known that the plaintiff, in laying down a thickness of asphaltic top in excess of 1 inch, was doing so because its superintendent interpreted the plans and specifications as permitting it and requiring it where to do so was necessary for proper drainage. If he felt—and he now says he did—that the plaintiff was thereby exceeding the thickness authorized, he should have interfered at the time. To stand by and do nothing about it was to acquiesce. Even more important than the foregoing is the fact that Courtlee specifically instructed the superintendent to proceed as he did. To my mind it is idle to say that Courtlee thereby exceeded his jurisdiction. He was on the job to see that the work, as it progressed, had that standard of excellence agreed upon between the parties. He gave those instructions, not for the purpose of varying the plans and specifications, but for the purpose of requiring the contractor to live up to them.

In my opinion, this is a clear case of estoppel.

When the time came for the engineer to issue his final certificate, he ignored that fact and thereby failed to act judicially. His conduct at that point was such as to make it, in the language of Mellish L.J., "inequitable that the condition precedent should be relied upon".

I now turn to the plaintiff's claim for gravel. Much of what I have said concerning the plaintiff's claim for asphalt applies with equal force to its claim for gravel.

The engineer's method for determining the quantity by weight of gravel that should have gone into the job in accordance with the plans and specifications was as follows:

He took the total surface area and multiplied it by 6 inches (the depth of gravel called for) and determined the total number of cubic yards. Then by adopting what someone told him was the weight of a cubic yard of gravel, he determined the quantity by weight of the total cubic yards. To that amount he added something as an allowance for gravel used in filling the voids in the rubble that was used to fill soft spots. How he could determine the quantity of gravel that was used in these soft spots I am totally unable to understand. He did not know the depth or area of the soft spots or the size of the voids.

When he quantified by weight the amount of gravel for which he was prepared to certify, he did not have the weigh-scale tickets or any records made from them before him. He had mislaid those tickets.

When he was later confronted with the fact that the total tonnage as shown by the duplicates of the tickets in the possession of the plaintiff had actually been incorporated into the job, he gave this explanation of the difference between that total and the total as computed by his method, namely, that the plaintiff had excavated to too great a depth.

It developed during the evidence that before Meadows, Buralgia or Courtlee came on the job at all, the plaintiff had dug up the old road over a distance of about two blocks at the south end of Simcoe Street and deposited the gravel in that area. Plainly, therefore, there was no evidence before the engineer as to the depth to which the plaintiff had excavated over that area. The engineer could only deduce that the plaintiff had excavated to too great a depth in that area.



It is important to recall that the specifications provided that "prior to the application of the first layer of the crushed gravel, the engineer must be satisfied that the sub-grade conforms to the elevations detailed within the limit of  $\frac{1}{4}$  inch".

Meadows stated in evidence that over the whole length of the street, except, of course, the southerly two blocks, he observed before the gravel was deposited that the plaintiff had excavated too deep, but he made no comment about it because, so he stated in evidence, he knew that the contractor would be paid only for the tonnage of gravel required to make a base 6 inches thick, subject to a variation beyond that not exceeding  $\frac{1}{4}$ -inch. If the engineer at that time felt that the contractor had excavated too deeply and as a result was not entitled to be paid for the excess of gravel, then how did the engineer at that time contemplate the contractor would be paid for the quantity of gravel as specified by the specifications? He knew that under the specifications there was to be only one method for determining that quantity and that was by weight as shown by the weigh-tickets. He apparently entirely ignored that factor even at that time.

This silence of the engineer would be construed by the plaintiff's superintendent as acquiescence and would amount to a representation by the engineer that he was satisfied as to the level of the sub-grade and that the plaintiff could proceed to deposit the gravel. The plaintiff's superintendent was proceeding in good faith. He thought he was complying with the specifications and the conduct of the engineer and his representatives confirmed him in that belief.

When the time came for issuing the final certificate there was only one method that the engineer could adopt for determining the quantity by weight of both the asphalt and the gravel and that method was the one prescribed in the specifications, namely, by the weight as shown by the weigh-tickets. He had no authority to substitute some other method.

For these reasons I would dismiss this appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the defendant, appellant: Creighton, Fraser & Drynan, Oshawa.*

*Solicitors for the plaintiff, respondent: McMillan, Binch, Wilkinson, Stuart, Berry & Wright, Toronto.*

## [COURT OF APPEAL.]

## Assaf v. The City of Toronto.

*Expropriation — Compensation — Amount to be Awarded — Expropriation of Hotel Premises — Value to Owner of Liquor Licences — The Municipal Act, R.S.O. 1950, c. 243, s. 349.*

In determining, under s. 349 of The Municipal Act, the compensation to be awarded to the owner of an hotel expropriated by the municipality, an important element of value to the owner is his possession of a liquor licence or licences, and the possibility or otherwise of his obtaining a transfer of that licence, or a new licence, if he establishes himself elsewhere. The proper way to determine the compensation in such a case, where there are many speculative features, is to approach it on the basis of what the owner, as a prudent man, would have paid at the time of the expropriation rather than be ejected from the property. *Woods Manufacturing Company Limited v. The King*, [1951] S.C.R. 504 at 508, applied. In doing this, the Court will consider what he might have paid for the additional value arising from his possession of the licence. *The Lake Erie and Northern Railway Company v. Schooley et al.* (1916), 53 S.C.R. 416, applied.

AN APPEAL by the owner of expropriated premises from an award of Barton Co. Ct. J., as Official Arbitrator, fixing the compensation to be paid.

16th and 17th April 1953. The appeal was heard by PICKUP C.J.O. and LAIDLAW, ROACH, HOPE and J. K. MACKAY JJ.A.

*R. W. Macaulay* (*W. D. S. Morden*, with him), for the appellant: This building was in a good state of repair, but in the award it was depreciated at the rate of 40 per cent. We bought the property in 1940 for \$75,000, of which \$50,000 was for the land and \$25,000 for the business. Between then and the date of the expropriation we spent more than \$42,500 for repairs and improvements. The learned arbitrator gave no consideration to the earnings, which were considerable.

We were allowed nothing for the loss of our liquor licences. The evidence discloses that the licences were restricted to these premises, and the business cannot be considered without also considering the licences. The property is well located, and there is no suitable location within a 500-foot radius to which we could transfer the hotel; the evidence is that we cannot obtain a transfer of a licence except to other premises within that distance.

The award of \$1,225 per foot frontage for the real estate is based on market value, and not on the value to the owner. In valuing the building the arbitrator considered only the cost of reconstruction and depreciation; there was no consideration of the special value of the building to the owner. Nor was there

any allowance for the fixtures that must go with the land because they are attached to the premises; these were not included in the reconstruction value. [PICKUP C.J.O.: If the arbitrator allowed you the cost of a new building, what difference does it make whether there is land available in the area?] We would have to buy built-up land and tear down the existing building before we could commence new construction. This would take at least two months, and we should be allowed some compensation for this lost time; \$26,424 is wholly inadequate for our loss by disturbance.

[PICKUP C.J.O.: Was the depreciation related to the useful life of the building?] No; there was no evidence as to the useful life of the building.

The proper measure of compensation is the value to the owner of the property in its actual condition at the time of taking, with all its existing advantages and the present value of prospective potentialities. We are entitled to recover all damages and losses actually resulting from the expropriation, and should not be either poorer or richer than before it: *Hayden Warehouses and Storage Limited v. The City of Toronto*, [1953] 1 D.L.R. 81; *Woods Manufacturing Company Limited v. The King*, [1951] S.C.R. 504, [1951] 2 D.L.R. 465, 67 C.R.T.C. 87; *Federal District Commission v. Dagenais*, [1935] Ex. C.R. 25; *Re Lennox and Toronto Board of Education* (1926), 58 O.L.R. 427 at 432, 442; *Diggon-Hibben, Limited v. The King*, [1949] S.C.R. 712, [1949] 4 D.L.R. 785; *Irving Oil Company Limited v. The King*, [1946] S.C.R. 551, [1946] 4 D.L.R. 625.

The cost or market value of the land and building does not determine its value, but may be a relevant consideration in the determination of compensation, as may money *bona fide* spent in improvements by the owner: *The Streatham and General Estates Company, Limited v. The Commissioners of Her Majesty's Works and Public Buildings* (1888), 52 J.P. 615; *Ex parte Cooper*; *In re The North London Railway Company* (1864), 34 L.J. Ch. 373; *Better Plumbing Company, Limited v. The City of Toronto*, [1951] O.R. 186, [1951] 2 D.L.R. 422.

I put forward three alternative submissions: We should have (1) an amount sufficient to re-establish ourselves or buy and set up at some new location, which should be at least \$275,000; or (2) the market value of the land, building and



licences; or (3) a value on each item separately, after a breakdown, and any actual loss proved.

There should be some compensation for the difference in gallonage between our hotel and any similar hotel within a radius of 500 feet; the evidence shows that our business in the 12 months immediately before the expropriation was 69,526 gallons, while the gallonage in the 12 months before our purchase was only 25,706. [HOPE J.A.: Such an item would be difficult to assess.] It was held in *Re Meyer and City of Toronto* (1914), 30 O.L.R. 426, in similar circumstances that where there was no similar location three years' profits would be a suitable compensation.

[PICKUP C.J.O.: Do you suggest that we send this case back to the Official Arbitrator?] No; I ask this Court to fix the compensation on proper principles on the evidence. [PICKUP C.J.O.: If you were compensated for the value of the business you would be paid for something the City has not taken.] The only things that we can take away are some chattels, and there is evidence as to their value: *Ricket v. The Directors, etc., of the Metropolitan Railway Company* (1867), L.R. 2 H.L. 175 at 205.

The compensation must be sufficient to cover all reasonable costs of moving, settling the new premises, loss of time in seeking a new location, and more especially the depreciation on the valuable business fixtures and fittings, including plumbing, at its full value, and additional depreciation to equipment from moving: Cripps on Compensation, 8th ed. 1938, pp. 184, 186; *Re Meyer and City of Toronto, supra*.

Where there is expropriation of premises in which business can be carried on only under special conditions or by means of a special licence, the principle of reinstatement should be applied. The cost to the appellant of reinstating himself is the measure of the damage that the expropriation has occasioned him: Cripps, *op. cit.*, pp. 180-1.

*F. A. A. Campbell, Q.C.* (A. P. G. Joy, with him), for the respondent: There is no evidence that this licence could not have been transferred in 1947, the date of the expropriation. The arbitrator was right in not allowing anything for the business, since it has not been lost, and the appellant is still operating it. Instead of re-establishing himself in 1947 the appellant was

willing to sit back and take his chances, because he had a profitable business.

The arbitrator applied the principles of law set out in the following cases: *Re Macpherson et al. and The City of Toronto* (1895), 26 O.R. 558; *Cedars Rapids Manufacturing and Power Company v. Lacoste et al.*, [1914] A.C. 569 at 576, 16 D.L.R. 168, 6 W.W.R. 62; *Pastoral Finance Association, Limited v. The Minister*, [1914] A.C. 1083 at 1087-9; *Re Watson and City of Toronto* (1917), 38 O.L.R. 103 at 115-7, 32 D.L.R. 637.

There can be no error in the arbitrator's taking 40 per cent. depreciation on the building; he might well have allowed greater depreciation.

We have expropriated the appellant's land, but not his licence. The arbitrator correctly took the view that the licence can be transferred to other premises: *Re Meyer and City of Toronto*, *supra*, at pp. 445-6. [LAIDLAW J.A.: Surely the location is an important consideration; even if the appellant could get a licence for another place, where could he find, in the immediate vicinity, an hotel with a comparable gallonage?] [PICKUP C.J.O.: The City is asking the appellant to take the risk of finding a place like the one he has now, without any compensation for his licence.] The licence has not been cancelled and is still in force.

*R. W. Macaulay*, in reply.

*Cur. adv. vult.*

11th May 1953. The judgment of the Court was delivered by

PICKUP C.J.O.:—This is an appeal from the award of the Official Arbitrator of the City of Toronto, His Honour Judge Barton, made on the 10th February 1953, wherein he awarded to the appellant (the claimant) the sum of \$145,000 as full compensation for lands belonging to the appellant expropriated by the Corporation of the City of Toronto by by-law passed on 17th February 1947.

The provision for compensation is contained in The Municipal Act, R.S.O. 1950, c. 243, s. 349. Under that section the corporation is required to make due compensation to the owner for the land expropriated and for any damage necessarily resulting from the expropriation of the land.

The lands expropriated are situate on Bay Street, in the city of Toronto, having a frontage of 35 feet 8 inches on the west

side of Bay Street just north of Queen Street, by a depth of 82 feet 3 inches. Upon the land is erected a four-storey brick building, with fire-escape to the rear, and a full basement. It is well located where traffic, at least during the day, is very heavy. The building consists of a basement, the ground floor and second, third and fourth floors. In the basement are the heating apparatus, storerooms, refrigerator units and a beer-cooler. On the ground floor there is a lobby with a ladies' beverage-room and a men's beverage-room, with washrooms for both ladies' and men's beverage-rooms. On the second floor there are two dining-rooms, with a lunch-counter, and also a fully-equipped kitchen, two washrooms and a counter. On the third floor there are ten bedrooms, nine equipped with sinks with hot and cold running water, one bathroom and a separate toilet. On the fourth floor there are ten bedrooms, eight equipped with sinks with hot and cold running water, one bathroom and a separate toilet.

The lands in question were purchased by the appellant in 1940. At that time the premises were being used as hotel premises, and the vendor had licences under The Liquor Control Act, R.S.O. 1937, c. 294. The price paid by the appellant was \$50,000 for the land and buildings, plus \$25,000 for the business. After purchase of the property the appellant expended substantial sums for repairs and improvements and acquired an additional licence under The Liquor Control Act. At the time of expropriation the appellant enjoyed with the lands the benefit of licences under The Liquor Licence Act, now R.S.O. 1950, c. 211, to sell beer in the beverage-rooms and with meals in the dining-room, and to sell wine and beer in the dining-rooms, and with meals in private rooms of registered occupants. Such licences are confined not only to the premises to which they apply, but also to the person licensed. Although the expropriating by-law was passed in 1947, possession of the premises by the appellant was not interfered with at that time, nor does it appear to have been interfered with since then. The result is that the appellant has, since 1947, been carrying on his business and enjoying the benefit of his licences under The Liquor Licence Act. The compensation must be determined as of the date of the passing of the by-law.



In arriving at the compensation which he allowed, the learned Official Arbitrator first proceeded to fix the value of the land and buildings as such, being guided by evidence given as to the market value of the land and by evidence given as to the cost of replacement less depreciation. After reviewing the evidence of witnesses the learned Official Arbitrator arrived at a value of the land of \$1,225 a foot, amounting to \$43,691.66 in all. He then adopted a reconstruction value of the building of \$107,800, fixed depreciation at 40 per cent. or \$43,120, which would leave the depreciated value of the building \$64,680 (given in the reasons for judgment as \$64,880). Adding the value of the land to the depreciated value of the building, both as found by the learned Official Arbitrator, it appears clear that the arbitrator allowed a total of \$108,371.66 as being the value of the land and buildings, but it seems equally clear that in such valuation the learned Official Arbitrator was considering only the value of the physical land and buildings, without regard to the fact (if it is a fact) that its value to the owner was increased by reason of the liquor licences attaching thereto. The Official Arbitrator then proceeds to say: "The claimant is also entitled to an allowance for all reasonable costs of moving, refitting and settling in new premises, loss of time in seeking a new location, depreciation of valuable business fixtures and fittings, and damage thereto due to moving, and a certain amount of dislocation or disturbance of business, which, however, cannot be fixed with mathematical certainty."

The learned Official Arbitrator considered that the respondent was liable only for the value to the owner of the real estate, with an allowance for costs of moving, and so forth, to which he referred, and which I have quoted. He concluded his reasons for award by allowing a total amount of \$135,000, to which he added \$10,000 for compulsory taking, making in all the sum of \$145,000.

I think it is clear from reading the reasons of the learned Official Arbitrator that all he allowed, apart from the sum of \$10,000 for compulsory taking, was the figure above mentioned of \$108,371.66 for the land and buildings, plus an amount equal to the difference between that figure and \$135,000 as being what he referred to as "an allowance for all reasonable costs of moving, refitting and settling in new premises, loss of time in seeking

a new location, depreciation of valuable business fixtures and fittings, and damage thereto due to moving, and a certain amount of dislocation or disturbance of business", none of which he said, could be fixed with mathematical certainty. This proceeds on the assumption that the appellant could acquire other premises, carry on therein a hotel business and get his liquor licence transferred, or get a new liquor licence.

The learned Official Arbitrator concedes, in his reasons for award, that what is to be determined is the value to the owner as it existed at the date of taking and not the value to the taker, and that such value consists of all advantages which the land possesses, both present and future, although it is the present value of those advantages that falls to be determined. Having stated this principle, he appears to have departed from it by proceeding on the supposition that the appellant could move his hotel business to some other premises and have his beer and wine licences transferred from the expropriated premises to such other premises. I can find no allowance whatever in the award for any value to the owner of the premises expropriated attributable to the fact that the owner, at the time of expropriation, enjoyed licences from the Liquor Licence Board to sell beer and wine in the premises. There was, in the existence of such licences, a value to the owner over and above the value of the land and buildings, and over and above the allowance made by the Official Arbitrator in respect of the other matters referred to by him.

The evidence established that under the present policy of the Liquor Licence Board a transfer of a liquor licence would not be permitted except within an area of 500 feet, although the learned Official Arbitrator cites in his reasons for award a case where this policy had apparently not been adhered to. According to the evidence there is no location within 500 feet of the expropriated premises where the appellant could locate with any reasonable expectation of carrying on the profitable business which he was carrying on at the premises expropriated. The only area within 500 feet would be on the south side of Queen Street between Bay and York Streets, which location would be off the main artery of pedestrian traffic, and would be in a run-down district surrounded, within a few hundred feet, by four other hotels. In the premises expropriated the appellant had a

business measured in gallonage of approximately 71,000 gallons, while the evidence shows that none of these other hotels had a liquor business in excess of 30,000 gallons. None of the buildings in this area of 500 feet, other than the hotels referred to, would be suitable for a hotel business, which would mean that if the appellant were to acquire any such premises other than hotels, he would be faced with not only the cost of the acquisition of the land and construction of the building, but the cost of tearing down existing buildings, in addition to other expense and loss involved in the moving and interruption of business. If the appellant were able to acquire one of the other existing hotels, he would be faced with a probable and very substantial loss by reason of the decrease in gallonage of business, and it would, I think, be most unreasonable to assume that the appellant could acquire any of the other existing hotels or any other property where he might reasonably expect to do a business of approximately 71,000 gallons, for the amount of the award to the appellant in this case.

The evidence shows that in the acquisition of a hotel business which enjoys a liquor licence the purchase-price for the business, including the lands and buildings and equipment, is based on the gallonage of business done, this price basis at the time of expropriation being \$4 per gallon. This is the evidence of witnesses called for the appellant, including a representative from the Liquor Licence Board. This evidence is not controverted and it indicates that if the appellant could acquire, either within or beyond the area of 500 feet, premises with a gallonage business equal to that he had, the cost to him of such premises would be in the neighbourhood of  $4 \times 71,000$  or \$284,000.

If the appellant were to attempt to re-establish himself in a similar business beyond the 500-foot area, the evidence indicates that at the date of expropriation he could not have obtained in the downtown area of Toronto comparable premises with a comparable gallonage. Whether they could be obtained elsewhere cannot be foreseen, but if they could be obtained by purchase elsewhere with the same gallonage, the cost of acquisition would, as above stated, be in the neighbourhood of \$4 per gallon of business of approximately 71,000 gallons, or \$284,000. In any event outside the 500-foot area it is quite impossible to say that the appellant's licence enjoyed by him at the time of



expropriation could be transferred to such other location. No such transfer can be made without the approval of the Liquor Licence Board, and many factors enter, and are bound to enter, into the decision of that Board in deciding whether it will or will not grant a licence in the new location, or transfer an existing licence to another location.

It is conceded by counsel for the respondent that the learned Official Arbitrator has, in his award, allowed nothing to the appellant for the loss of his liquor licences, and I think it is clear that nothing has been allowed for the fact that the existing licence enjoyed by the appellant will come to an end when the respondent takes possession of the expropriated premises. This licence represents a value to the owner of the lands expropriated which has not been taken into consideration in the amount of compensation allowed.

Evidence was given before the Official Arbitrator as to two offers which were made to the appellant for his business, including the premises. Both of these offers were conditional upon obtaining the approval of the Liquor Licence Board to the transfer of the beer and wine licences. The offers, although in writing, were not kept, but oral evidence was given of them both by the claimant and by the real estate broker who made the respective offers. The first offer was in the fall of 1946 and was an offer of \$275,000. The second offer was in 1947 but it is not clear from the evidence whether it was before or after the date of the by-law. That offer was for \$300,000. Both offers were declined by the appellant. They were both, however, offers for the business and premises with all the equipment, affixed or otherwise, which attached to the business, and it is impossible to segregate from the offers, with any degree of accuracy, what amount thereof should be related to chattel property or tenant's fixtures which are not taken by the respondent. According to the evidence these would not appear to affect the price, although they go with the sale. The learned Official Arbitrator did not reject the evidence of these offers on any ground of credibility of the witnesses, but considered them irrelevant.

There is other evidence as to the value of a business such as the one the appellant was carrying on, without the land and buildings. That evidence indicates that the value of such a

business is also related to gallonage, the basis of value, at the time of expropriation, being \$2 per gallon of business, which, if the gallonage of business were 71,000 gallons, would be \$142,000. This figure again would include tenant's fixtures and chattel property not taken by the respondent, and is conditional on the liquor licence being transferred to the purchaser at the expense of the vendor.

Counsel for the respondent argues that nothing should be allowed in respect of alleged loss of licence because the appellant has not proved that he cannot get his licence transferred to some other location if and when he acquires such other location. I do not think that fact is capable of proof. He did make two such applications since the date of expropriation, which applications were refused, but so many factors enter into the granting or refusal of a licence or transfer of licence that I do not think much weight can be given to the fact of such refusals. Whether the burden of proof of inability to get his licences transferred is on the appellant, or whether the burden is on the respondent to prove the opposite proposition, namely, that the appellant could obtain a transfer of his licences to some other location, the fact remains that by reason of this expropriation the appellant is left in the position where the premises which he had and with which he enjoyed a liquor licence are taken from him, with the licence coming to an end in relation to those premises when the respondent takes possession. By the award the appellant is left to take the risk of being able to get a licence elsewhere by transfer or otherwise without any compensation for the loss he may suffer. What was taken from him was property to which was attached a licence. What the award purports to provide is an amount of money which would enable the appellant to acquire new premises and move thereto, but such new premises would be premises without a licence. The appellant might or might not obtain such licence and the weight of the evidence seems to me to be strongly against the probability of his obtaining such a licence unless he moves to a location within the 500-foot area, or builds in some other location a larger hotel so as to comply with the present policy of the Board under which new licences will not be granted unless there is a minimum of 50 bedrooms in the hotel. Even if the appellant proposed to construct such

larger hotel, there would still be no certainty of obtaining a licence in respect thereof.

What may happen if the appellant endeavours to establish himself elsewhere is so speculative that I think the proper way to determine the amount of compensation in this case is to approach it on the basis of what the appellant, as a prudent man at the time of the expropriation of his property, would have paid for it rather than be ejected from it. I use the language of Rand J. in *Diggon-Hibben, Limited v. The King*, [1949] S.C.R. 712, [1949] 4 D.L.R. 785, 64 C.R.T.C. 295, as adopted in *Woods Manufacturing Company Limited v. The King*, [1951] S.C.R. 504 at 508, [1951] 2 D.L.R. 465, 67 C.R.T.C. 87.

Approaching the matter in this way, the two offers which were made to the appellant in 1946 and 1947 are, in my opinion, very relevant. Both of these offers were refused, but the witness Mastronardi, who brought the \$275,000 offer, said in his evidence that the appellant was not interested in selling at that time but would have considered an offer of \$325,000. The appellant said in evidence that he considered the price should be \$350,000, but the appellant's witness, Knight, considered that figure too high and thought that in 1947 a price of \$275,000 would be a satisfactory price for a purchaser to pay. There is no reason to consider either of these offers as not being *bona fide*. All of these figures are subject to obtaining a transfer of the liquor licences and the vendor would have to pay the tax on such transfer, which would amount to approximately \$45,000.

In considering the loss which has been sustained by the appellant there is also the factor that since the date of expropriation the appellant has not been disturbed in his possession and has continued to enjoy the benefit of his business and licence. Although the compensation must be fixed as of the date of expropriation, the licences which the appellant enjoyed have continued, and, for the time being, still continue. He should, therefore, not receive compensation on the basis that by reason of the expropriation he lost his licence at the date of the by-law.

In the year ending 31st December 1946 the profits of the appellant from the business carried on by him after operating expenses and after depreciation, but before income tax, amounted to \$17,349.83. In the year ending 31st December 1947 his profits, computed on the same basis, amounted to \$23,131.76.



The amount of his profits since the year 1947 does not appear in evidence. Then, it must not be overlooked that there is the possibility, by reason of a favourable position of being a present licence-holder, that if he locates his hotel business elsewhere he may obtain a transfer of his licence or obtain a new licence.

Counsel for the appellant asks this Court to increase the award to the sum of \$215,618.66. He arrives at this figure in the following manner:

|                                                                         |              |
|-------------------------------------------------------------------------|--------------|
| Value of land as found by the Official Arbitrator .....                 | \$ 43,691.66 |
| Depreciated value of building as found by the Official Arbitrator ..... | 64,880.00    |
| Allowance for compulsory taking .....                                   | 10,000.00    |
| Value of business and licence .....                                     | 97,047.00    |
| <hr/>                                                                   |              |
| Total .....                                                             | \$215,618.66 |

It will be seen that there is an error of \$200 in the figure given as being the depreciated value of the building as found by the Official Arbitrator, the correct figure being \$64,680.00. This would decrease the total amount asked for by counsel for the appellant by \$200.

The above-mentioned figure of \$97,047 was arrived at by taking the value of the business, excluding the value of the lands and buildings, at \$142,000 and deducting therefrom the amount of tax payable on the transfer of licence. In these figures counsel for the appellant excludes from his calculation the allowance made by the Official Arbitrator for what the Official Arbitrator referred to as being an allowance for reasonable costs of moving, refitting and settling in new premises, and so forth.

If we take the offer of \$275,000 as indicating the approximate value to the owner in 1947 of the whole business, including lands and buildings, we must first deduct therefrom the tax which the appellant would have had to pay if he were going to realize any such figure, namely, approximately \$45,000, and, from the resulting figure of \$230,000, make allowance as best one can for the fact that the appellant is left with tenant's fixtures and chattel property which have not been taken, and the fact that his right to continue to operate his hotel business and enjoy his liquor licences did not come to an end when the by-law was passed.

Then, as I have indicated, we must take into consideration, in reduction of the compensation below any figure of value of the whole business and premises, including licences, the fact that the appellant, as the holder of such a licence is in a more favoured position than one who had not had such a licence. His chance of obtaining a new licence or a transfer of licence by reason of his having been a licence-holder whose premises have been expropriated has not been taken from him and is worth something.

Taking all these matters into consideration it is plain that one cannot, with any degree of mathematical accuracy, determine the true value to the owner of the lands expropriated. We have two offers rejected by the owner; one an offer of \$275,000 less tax of \$45,000, or, say, \$230,000; another an offer of \$300,000 less tax of \$45,000 or, say, \$255,000. We have evidence indicating that the value, as a going concern with transfer of licences, is between those two figures of \$275,00 and \$300,000. We have the fact that the expropriation did not immediately end the appellant's enjoyment of his business and liquor licences. We have evidence that the profits after all expenses and depreciation, but before income tax, amounted to about \$17,000 in 1946 and about \$23,000 in 1947. There is no evidence of what such profits have amounted to since, but it is not to be assumed that they would be any less in the later years. We have also before us the fact that there is probably some salvage value in tenant's fixtures and chattel property which the appellant still owns. I am convinced that the amount allowed by the learned Official Arbitrator does not represent the value to the owner of what has been taken from him.

Under the circumstances of this case I do not think that the matter should be sent back to the Official Arbitrator.

I do find assistance in the judgment of the Supreme Court of Canada in the case of *The Lake Erie and Northern Railway Company v. Schooley et al.* (1916), 53 S.C.R. 416, 30 D.L.R. 289. In that case the property expropriated had a special value to the owner in that it would have cost him more to operate elsewhere. The arbitrators had allowed a sum of \$20,000 to represent this feature of special adaptability as being value to the owner. The arbitrators proceeded on a wrong principle in arriving at the amount to be allowed for this element of value. The Supreme

Court fixed a sum which, in their judgment, might represent the amount which a prudent man in the position of the owner at the time of expropriation might have paid for this additional value which was attached to the lands expropriated.

Now what would the appellant, as a prudent man, have paid at the date of the by-law, rather than be ejected from his property as he eventually will be under this by-law? Plainly, not the amount representing the value to him if he immediately handed over possession to a purchaser. He would put some value on his chance to continue to carry on for an uncertain period. He would also put some value on his favoured position as to obtaining a transfer of licence or a new licence. He might or might not put some value on his fixtures and chattel property not taken from him.

Taking all of these matters into consideration, I think the appellant would be reasonably compensated and the respondent would be fairly treated if the award made by the learned Official Arbitrator in this case were increased to a total sum of \$180,000, which is intended to include any allowance which should be made for compulsory taking.

I would allow the appeal with costs, and increase the amount of the award accordingly.

*Appeal allowed with costs.*

*Solicitors for the appellant: McLaughlin, Macaulay, May & Soward, Toronto.*

*Solicitor for the respondent: W. G. Angus, Toronto.*



[COURT OF APPEAL.]

**Regina v. Tilley.**

*Criminal Law—Criminal Sexual Psychopaths—Sufficiency of Evidence—“Course of misconduct”—What Period of Time Required—The Criminal Code, R.S.C. 1927, c. 36, s. 1054A, enacted by 1947-48, c. 39, s. 43, and amended by 1950, c. 11, s. 19.*

The accused, having been convicted of indecent assault, was further found to be a criminal sexual psychopath, and was sentenced accordingly. He appealed.

*Held*, the appeal must be dismissed. The evidence (fully reviewed in the reasons for judgment) was ample to support the trial judge's conclusion. The fact that the direct evidence as to the accused's conduct related only to a period of two days did not mean that the Crown had failed to establish a “course of misconduct”. There might be a “course of misconduct” within the meaning of s. 1054A of The Criminal Code in a space of time much shorter than that. The errors at the trial set out in the following paragraphs, although they should be condemned, were not sufficient ground for setting aside the finding and sentence.

*Evidence—Cross-examination—Impropriety of Cross-examining Accused as to whether he has been previously Questioned in Relation to Similar Offences—The Canada Evidence Act, R.S.C. 1927, c. 59, s. 12.*

It is wholly improper for Crown counsel, in his cross-examination of the accused, to ask him whether he has been previously questioned by police officers in respect of offences similar to that with which he is now charged. Although under s. 12 of The Canada Evidence Act the accused may be cross-examined as to previous convictions, the section permits no more than that. To carry the practice further, and by adroit questions to suggest that the accused, though not previously convicted, has been previously suspected, surpasses not only what is permitted by the statute but also all possible bounds of fairness, and should be most vigorously condemned.

*Evidence—Expert Evidence—Proper Form of Question—Impropriety of Asking Witness to Express Opinion on Basis of Evidence Adduced by Crown—Hypothetical Question.*

It is not proper to ask a psychiatrist, called on an inquiry as to whether the accused is a criminal sexual psychopath, whether in his opinion, formed after hearing the evidence adduced for the prosecution on the issue, the accused is such a psychopath. The proper course is to put the alleged facts to the psychiatrist hypothetically, and not *en bloc*, and ask him to assume one or more of them to be true and state his opinion thereon. It is for the trial judge alone to determine what the facts actually are and to make his finding, aided by the expert opinion of the psychiatrists, on the facts as determined by him. *Regina v. Frances* (1849), 4 Cox C.C. 57, applied.

AN APPEAL from a conviction, before Madden Co. Ct. J. and a jury in the Court of General Sessions of the Peace for the County of Carleton, of indecent assault on a young girl, and from the sentence imposed. After the conviction the trial judge heard evidence as to whether the accused was a criminal sexual psychopath, found him to be so, and sentenced him accordingly: 104 C.C.C. 315 at 316. The appeal from conviction was dismissed at the hearing, and the argument is noted only in so far as it relates to the issue leading to the sentence.

14th and 15th April 1953. The appeal was heard by PICKUP C.J.O. and ROACH and J. K. MACKAY JJ.A.

*G. A. Martin, Q.C.*, for the appellant: 1. The evidence does not support a finding that the accused was a criminal sexual psychopath, as defined in subs. 8 of s. 1054A of The Criminal Code, R.S.C. 1927, c. 36, as enacted by 1947-48, c. 39, s. 43, and amended by 1950, c. 11, s. 19. Anything done by the accused with these two women, although it may have been a deviation from normal, was not prohibited by any statute, and was done by mutual consent, and was therefore no crime. The accused has no previous record of sexual offences, and therefore the only foundation for alleging that he comes within the definition must be that there has been a "course of misconduct", which implies a succession or series of acts. The accused's conduct on this one day cannot be such a "course": Shorter Oxford Dictionary, vol. 1, p. 410, defn. 13. [PICKUP C.J.O.: Is not the important requirement of subs. 8 that the accused's conduct must be such as to show "a lack of power to control his sexual impulses"?] My submission is that his "course of misconduct" must be of that nature, and that the first requirement is a "course". It has been held in *Warkentin v. Kleinwachter* (1933), 27 P. (2d) 160 at 163, that a "course of conduct" necessarily involves more than a single transaction.

2. The trial judge misdirected himself as to the effect of the evidence of intoxication. There is evidence that the accused drank a great deal on that day and that he was not a habitual drinker, and there is evidence that drinking has the effect of removing inhibitions that normally exist. The trial judge said in effect: "If he is dangerous when he drinks, then he is dangerous." He also said that quite apart from the evidence as to what happened in the room at the tourist-home he would have found the accused to be a criminal sexual psychopath solely on the evidence of the attack on the little girl. This is clearly wrong.

My arguments on points 1 and 2 may be summarized in the submission that the trial judge directed his mind entirely to the question whether the accused was a criminal sexual psychopath in the ordinary sense, without considering whether he had been brought within the statutory definition contained in subs. 8.

3. The evidence of the psychiatrists was given in a wholly improper way. They were asked in effect: "Having heard the

evidence given here to-day, in your opinion is the accused a criminal sexual psychopath?" This assumes the truth of all the evidence for the prosecution, and makes the doctor the judge of the very matter that is before the Court for decision: *Regina v. Frances* (1849), 4 Cox C.C. 57.

4. One of the accused's witnesses, Davidson, was asked in cross-examination whether he had been questioned by the police about the accused on a previous occasion. He did not deny having been questioned, but said he did not remember it. The Crown was then permitted to call a witness in reply to prove the questioning. This was improper because (1) it was contradicting Davidson on a collateral issue, and (2) it in no way tended to rebut Davidson's evidence as to the accused's previous good character. Further, the accused himself was cross-examined about previous questionings by the police, which was highly improper: *Stirland v. Director of Public Prosecutions*, [1944] A.C. 315, [1944] 2 All E.R. 13, 30 Cr. App. R. 40.

*W. B. Common, Q.C.*, for the Attorney-General, respondent: There is nothing in the trial judge's reasons to indicate that he was doing anything but apply the evidence judicially, and himself finding that the accused came within s. 1054A. [PICKUP C.J.O.: Is there anything to indicate that he directed his mind expressly to the question of a "course of misconduct" such as is defined by subs. 8?] He does not say so expressly, but it is clear from the whole of his reasons that he was considering precisely that.

The expression "course of misconduct" is not necessarily related to any extended time factor. It may relate to the diversified character of the accused's sexual misconduct. "Course" may be synonymous with "type" or "pattern". A course of conduct may be inferred from specific acts committed within ten or twenty hours. In this connection weight should be given to the exorbitant amounts of money offered by the accused to different people, and the blatancy of his acts. [PICKUP C.J.O.: Might that not be explained, on that particular day, by his drinking?] His conduct did not indicate intoxication; apart from the sexual side, his conduct was apparently wholly normal.

2. There is nothing in the reasons for judgment on this point, although it is true that during argument the trial judge said he did not think the accused's drinking had anything to do with the matter. Further, as I have just suggested, there is nothing in the evidence to suggest that the accused was in-



intoxicated, apart from what he said himself, and this the trial judge rejected. [ROACH J.A.: Surely it is not correct to say, as the trial judge does, that a man may be a criminal sexual psychopath when drinking and not when sober.] I agree; this is a condition that exists whether a man is drunk or sober. This Court should not speculate. Two outstanding psychiatrists have expressed their opinion, and the accused himself denies that he was drunk. [ROACH J.A.: A man who has an abnormal sexual urge, but has the will-power to control it, is clearly not within the section. Is he to be brought within it if he drinks and the drink temporarily destroys that will-power?] He might not be, but this accused did not suggest that his drinking had anything to do with his conduct. It is clear that he knew exactly what he was doing, and that liquor had nothing to do with it. His defence is a complete denial, and nothing else.

3. The only way in which the psychiatrists could give evidence on this issue was to say in effect: "On the assumption that the evidence given here is true, we think the accused is within the definition in the Code." They were in no way usurping the trial judge's function. [PICKUP C.J.O.: It is clear that they directed their attention only to the last part of subs. 8, the likelihood of danger.] There is evidence by them as to a course of misconduct. [PICKUP C.J.O.: It seems to me that the doctors' evidence involves an assumption (without any evidence at all) that there was misconduct before this particular day.] That is only an opinion, that the conduct on this one day could not have been isolated. The trial judge was not bound to accept that opinion. In any case, it is for this Court, on the evidence given, to come to a conclusion.

4. I concede that this rebuttal evidence should not have been permitted, but it did not go to the issue, and could not have affected the result.

Since the appellant does not question the veracity of the evidence, this Court is in as good a position as the trial judge to come to a conclusion on it. With the exception of the witness Caron, none of the witnesses as to the factual aspects of the case was shaken on cross-examination.

*G. A. Martin, Q.C.*, in reply: I did not concede the truth of the evidence given by the Crown witnesses, but merely submitted that even if that evidence was accepted it did not establish the allegation. There are many discrepancies in the evidence and

the characters of the witnesses might lead one to hesitate to accept their evidence.

If Parliament had not required that something habitual be shown, it would not have used the words "course of misconduct", but would have said "by misconduct . . . has evidenced", etc.

The offences specified in subs. 1 of s. 1054A are all sexual offences either accompanied by violence or against children; ss. 202 (buggery) and 206 (gross indecency) are not included. Parliament clearly did not contemplate offences, even serious ones, between adults by consent, and presumably those offences are not the kind of sexual misconduct contemplated in subs. 8. [ROACH J.A.: Is it not possible to construe subs. 8 as meaning that if there is a course of misconduct showing an abnormal, sexual urge a psychiatrist may give evidence that that conduct indicates a lack of power to control and a potential danger to others?] The fact that a man seeks to gratify an abnormal sexual urge does not necessarily prove that he lacks the power to control it. [PICKUP C.J.O.: Your position is that one who does an act without consent shows a lack of control, whereas one who gratifies his sexual desires with the consent of the other person is not necessarily showing a lack of control at all.] Precisely. The accused, when Mrs. Pappas refused his proposition, immediately apologized. He clearly did not lack the power of control in that instance.

*Cur. adv. vult.*

11th May 1953. PICKUP C.J.O. agrees with ROACH J.A.

ROACH J.A.:—Appellant was convicted in the Court of General Sessions of the Peace in and for the County of Carleton on the 4th October 1952, on the charge that on the 13th day of July, 1951, he did unlawfully and indecently assault one Elizabeth White, a female, contrary to s. 292(a) of The Criminal Code, R.S.C. 1927, c. 36.

Before sentence was imposed, the Court, at the instance of Crown counsel and acting under s. 1054A of The Criminal Code, enacted by 1947-48, c. 39, s. 43, and amended by 1950, c. 11, s. 19, heard evidence on which it found that the appellant was a criminal sexual psychopath, and imposed a sentence for the offence of which he had been convicted of two years in the penitentiary and an indeterminate period thereafter.

The appellant appealed against the conviction and by leave of the Court also against sentence.

This Court first heard the appeal against the conviction and at the conclusion of the argument dismissed it. It then heard the appeal against sentence and reserved its decision.

The grounds of appeal against sentence were several and I now deal with them although not in the order in which they were presented.

It was argued that the evidence failed to show that the appellant was a criminal sexual psychopath.

Elizabeth White was a little girl seven years of age. In the evening of 13th July 1951 she was playing on a street in the city of Ottawa. The appellant induced her to get into his motor car, drove her to the outskirts of the city where he indecently assaulted her and then put her out of the car. The trial judge on the issue stated that he believed the whole story as told by the little girl in evidence. The accused did not have sexual intercourse with the little girl. That was physically impossible, even if he were capable of the act. On his own statement to Dr. Tennant, he is impotent. In his evidence he denied impotency and testified that by his statement to Dr. Tennant he meant only that his potency had declined because of his years. He is now about 57 years old. The learned trial judge has found on conflicting evidence that if he is not completely impotent, he is nearly so and "to satisfy his sex urge he is in search of abnormal stimulus". He inflicted painful and serious injuries on the sexual organs of the little girl either by the use of his hands or otherwise. His conduct toward the little girl was almost sadistic. Having completed his sexual attack upon her, he told her to get out of the car and threatened that if she did not do so he would kill her.

Before referring to other evidence, it may be well to quote from the trial judge's reasons. He said: "In spite of the evidence of the accused and of his wife [who also denied that the accused was impotent], I believe that *all the other evidence in the entire case* leads to the irresistible conclusion that the accused, due to his impotency, is going around seeking by some unorthodox fashion, or in this case criminal means, to satisfy his sex urge. If he is allowed to go free after serving a sentence for indecent assault he will be a menace." (The italics are mine.) I take that statement to mean that the trial judge accepted "all the



other evidence" as to "unorthodox fashion" and "criminal means".

I now review the other evidence which the trial judge accepted as to the events which happened in their chronological order.

The appellant, who lived in Toronto, motored in his own car to Ottawa on 12th July, apparently on business. He registered at the Ritz Hotel. That night he met a woman of easy or no virtue named Mrs. Speers. After a period of some drinking in another hotel they finally went to a room in a building known as the Terrence Court. It is a cheap rooming-house or tourist-home operated by one Mrs. Pappas. There is some conflict in the evidence as to the hour of their arrival but it was in the neighbourhood of three or four o'clock in the morning. The appellant registered himself and Mrs. Speers as man and wife. After having arrived in the room they spent some time drinking together. Up to that point there is no conflict in the evidence.

Some time later that morning Mrs. Pappas was aroused by a woman's screams emanating from that room. She rushed toward it and heard cries for help. The door to the room was locked by a chain on the inside. Mrs. Pappas made her presence known and in a moment Mrs. Speers opened the door and complained that Tilley was a sex maniac and indicated unmistakably that he had either wanted to or tried to indulge in perverse sexual acts with her. Tilley, on the other hand, said the woman had tried to steal his money.

Mrs. Speers testified that when she refused to accede to Tilley's request he became violent, threw her on the bed and grabbed her by the throat and started choking her.

Tilley, in his evidence, denied that whole incident. According to him, Mrs. Speers left the room to purchase another bottle of whisky; he lay down on the bed, fell asleep and did not awaken until the following afternoon when Mrs. Pappas came in to clean up the room. He then discovered that his female companion was gone and also his money.

I would certainly find difficulty in accepting Tilley's story. He did not go to this room with that woman just to drink. According to him he has not the drinking habit. Neither did he go there just to sleep. He had other things in mind.

The trial judge did not accept Tilley's story as to that incident. Apart from what I earlier quoted from the judge's

reasons, there is another part of them which indicates, though he does not so state in terms, that he accepted the evidence of Mrs. Speers, corroborated in part by Mrs. Pappas. In that part of his reasons the learned judge speaks of Mrs. Speers and another woman, Caron by name, to whose evidence I shall refer later, as "accomplices". It is clear from what immediately follows in the judge's reasons that he classed them as accomplices because they associated voluntarily with Tilley for illicit sexual purposes. Having considered them as accomplices, the trial judge refers to other evidence which, as I read his reasons, he thought corroborated their evidence. They were certainly not accomplices to the assault made upon them and the evidence to which the trial judge referred—and it did not include the evidence of Mrs. Pappas—does not corroborate their stories of these assaults. The only inference to be drawn from that part of the judge's reasons is that he accepted their evidence but wanted to make it plain that there was present to his mind the necessity, as he concluded, for corroboration before acting on their evidence alone.

In the afternoon of 13th July we find Tilley still or again in the room in the Terrence Court. He has another prostitute with him this time, by the name of Caron. There is also present a taxi-driver, Lynch by name. It was Lynch's information given to the police after the assault on Elizabeth White that eventually led to the arrest of the appellant. The trial judge has specifically stated that he believed Lynch as to what went on in that room that afternoon.

Lynch testified to an effort made by Tilley to commit a depraved sexual act upon him. Lynch repulsed him. Then Tilley, with the consent and co-operation of the prostitute, committed an abominable sexual perverse act upon her, not once but twice. On the second occasion he hurt her and she made him desist. Tilley had actually invited Lynch to remain in the room and observe those performances.

Lynch then left on an errand for Tilley. He returned shortly and found Tilley looking and acting "like a maniac". Lynch was frightened and went to summon the proprietress, Mrs. Pappas. It does not appear how long it took him to find her. Eventually he found her and together they returned to the room. The door was locked and the Caron woman was screaming for someone to take her out of there. Lynch rapped on the door a couple of

times. Finally it was opened by the Caron woman who was very much agitated and who at once complained that Tilley had tried to choke her. Tilley did not deny the accusation. Lynch waited until the Caron woman regained her composure and then he took her away from the place. Mrs. Pappas then told Tilley to get out and he did. That was about 6 p.m.

The Caron woman stated in evidence that Tilley had become violent and attempted to choke her while Lynch was absent from the room. Tilley had wanted to commit the same act upon her a third time and she refused.

That evening about 8 o'clock Tilley was in his car parked on the street near the Victoria Hotel. It was a warm evening; women from nearby residences were on the street near the front of their respective homes and children were playing about. Elizabeth White was one of them. It was there that Tilley induced her to get into his car and drove away with her.

Prior to picking her up, Tilley spoke to one of the women and brazenly asked her if she could find him a young girl and pointed to one of the children—not Elizaebth White but another child. When the woman stated that the girl was only a child, Tilley replied that he did not want to hurt her and indicated that he wanted to commit with her the sexual act which he had sought to commit with the Speers woman and had in fact committed with the Caron woman. A silent alarm having been raised, the mother of the child took her in off the street.

The Crown called two psychiatrists, one Dr. Tennant, the other Dr. Cathcart. The former had been nominated by the Attorney-General and prior to the trial had examined the appellant. Both psychiatrists were present in the court-room and heard all the evidence adduced on the trial of the accused and also the other evidence adduced by the Crown on the issue as to whether the appellant was a criminal sexual psychopath. They stated in evidence that in their opinion the appellant was a criminal sexual psychopath as defined by subs 8 of s. 1054A. Dr. Cathcart based his opinion solely on the evidence he had heard during the proceedings. Dr. Tennant based his opinion on that evidence and on his examination of the appellant.

Dr. Cathcart referred to what he called the "pattern" of sexual conduct as described in that evidence. In the whole period covered by that evidence there was no suggestion of normal sex behaviour by Tilley in response to his sexual urge. The language



used by Tilley, and his obvious familiarity with the techniques, indicated to Dr. Cathcart that this pattern of sexual conduct "had been established some time before". As he put it, Tilley "started right in with abnormal sex behaviour" and "that doesn't suggest a beginner in this type of perversion". All Tilley's "inhibitions, restraints, conscience and his sense of guilt are pretty easily abolished". His conduct was more consistent with impotency than with potency; he was acting under a compulsive sexual urge and was experiencing a disturbing sense of frustration. The doctor made what he called due allowance for the fact that the victims of Tilley's earlier assaults were two prostitutes. To the doctor that indicated a psychosis and the nature of the attack on the little girl confirmed his opinion that, without doubt, Tilley had such a psychosis associated with his compulsive sexual urge as to make it likely that unless restrained, he was likely to "attack or otherwise inflict injury, loss, pain or other evil" on other persons.

Dr. Tennant's evidence was to the same effect.

Mr. Martin argued that what happened on those two days as disclosed by the evidence does not constitute a "course of misconduct" within the meaning of s. 1054A(8). I entirely disagree. There may be a course of misconduct within the meaning of that section in a space of time much less than was consumed in this case.

I have given anxious consideration to the fact that during this whole period of sexual misconduct the appellant unquestionably had been drinking. Should his conduct be attributed solely to his drinking or was there a psychosis which was the real cause of that misconduct?

Since the argument was concluded I have re-read the evidence with care, having that question in mind. No one, excepting the appellant himself, suggests that at any time he was drunk, and I think nearly every witness was asked concerning the appellant's state of sobriety. In my opinion the learned trial judge was right in finding that the appellant is a criminal sexual psychopath and that his powers of restraint and self-control, his inhibitions, his conscience and his sense of guilt are so superficial as to constitute in him a sexual psychopathic condition. His drinking had very little to do with his conduct; the psychosis was the real cause.

Counsel for the appellant argued that there were errors during the inquiry conducted by the learned trial judge on the issue as to whether the appellant was a criminal sexual psychopath, and that those errors vitiate his finding on that issue.

I now deal with those arguments.

The accused did not give evidence on the trial of the substantive offence charged against him. He did give evidence on the issue as to whether he was a criminal sexual psychopath.

The first error of which counsel complains is that the learned trial judge permitted Crown counsel to cross-examine the accused as to whether he had been questioned by the police on another occasion.

The first question put to the appellant by Crown counsel was as follows: "Now Tilley, you have been questioned several times by the police about similar instances?"

Counsel for the appellant immediately and quite properly objected, whereupon the trial judge ruled that Crown counsel "should refer to specific incidents".

Then Crown counsel put this question: ". . . do you remember being questioned by a police officer whose name was I. H. Roberts in connection with two indecent assaults on two young girls near Tara in that county on the 16th of July, 1945?"

Counsel for the appellant, again quite properly, immediately objected. The trial judge ruled that the question might be admissible on the question of credibility. There followed considerable discussion between the judge and counsel. Finally the trial judge, addressing Crown counsel, said: "Unless you can show this ended up by a conviction, then it can go only to the question of credibility and if it goes only to the question of credibility I am not interested in what he was questioned about. I am only interested in whether or not he was questioned, and if you can prove he was and he says he doesn't remember, it is a reflection on his ability to recall things."

Then Crown counsel asked Inspector Mackay to stand up—he was said to be an Inspector in the Criminal Investigation Branch of the Ontario Provincial Police—and he asked the appellant whether he remembered being questioned "quite extensively" by the inspector as to his whereabouts on the 9th July 1945, and on the 7th or the 6th July 1945. The accused replied that he remembered being questioned but he did not remember the dates or the man who questioned him.

Then the appellant was asked by Crown counsel whether he remembered if one H. H. Davidson, an earlier witness on behalf of the appellant, was present "when a Provincial Police inspector was questioning" him. The appellant replied that he did not think Davidson was present. That answer, of course, implied that the appellant had been questioned at some time and place by a Provincial Police inspector, although Davidson may or may not have been present.

Fortunately, that ended that type of cross-examination. It is unfortunate that it was ever permitted because it was most improper. Counsel for the appellant asked him on re-examination whether he had ever been charged with the commission of any offence, sexual or otherwise, following those admitted interrogations and he said he had not. Counsel for the Crown must have known that to be a fact. Therefore, he could have had only one purpose in mind by the line of questions to which I have referred and that was to attempt to show that in July 1945 the appellant was suspected of having committed a sexual offence against a female. It is elementary in the field of criminal jurisprudence that suspicions, though piled as high as the sky, are still only suspicions. They prove nothing.

The learned trial judge erred in admitting the questions on the ground that the answers might be a test of the credibility of the appellant.

Under The Canada Evidence Act, R.S.C. 1927, c. 59, s. 12: "A witness [and that includes an accused giving evidence on his own behalf] may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction." To carry the practice further and by adroit questions to suggest to the accused, and thereby to the tribunal, that the accused, though not previously convicted, has previously been suspected of having committed a crime, surpasses not only that which is permitted by the statute, but also all possible bounds of fairness and should be most vigorously condemned. Since an accused should not be asked if he was ever previously suspected of a crime, it follows that he cannot be asked if he *remembers* being suspected. It would be impossible to remember unless it was a fact.

It is only after anxious consideration that I have reached the conclusion that the admission of this evidence should not be



held sufficient ground to reverse the finding of the learned trial judge. As appears from what I have quoted, the trial judge stated that the only use he could make of the evidence was to test the credibility of the appellant. Since he stated that much, I think this Court should conclude that the trial judge did not extend the use of that evidence beyond that purpose. Since the appellant admitted having been previously suspected and questioned, his credibility was not thereby impugned.

The next error of which counsel complains is that the trial judge erred in admitting evidence in reply by a Crown witness contradicting a defence witness on a collateral matter.

One H. H. Davidson was called as a witness on behalf of the appellant. The appellant had been known by Davidson for fully 15 years and employed by him for 6 years as an insurance agent. Counsel for the appellant, having established those facts in evidence, asked this witness only two further questions as follows:

"Q. And during the time you have known Mr. Tilley would you know his reputation for honesty and integrity and good morals? A. Yes.

"Q. What was that reputation Mr. Davidson? A. Very favourable."

The first question put to Davidson in cross-examination by Crown counsel was this:

"Q. Mr. Davidson, you were questioned by the police before about Mr. Tilley about sexual acts when he was in your employ, were you not?" Davidson replied: "Not to my knowledge." Counsel pressed him and fixed the date of the suggested interview as sometime in July 1945. Davidson persisted that he did not recall any such interview.

In reply Crown counsel called Inspector Mackay who testified that in July 1945, at his request, Davidson had arranged an interview between him and the appellant and was present at the interview when he (Mackay) told the appellant about "certain complaints". Counsel for the appellant objected and the trial judge ruled that the evidence was admissible because it contradicted Davidson and, therefore, went to the question of his credibility.

That type of cross-examination was of the same pattern as the type which I have earlier discussed and just as objectionable.

Counsel for the appellant was within his rights in calling evidence as to the general reputation of the appellant for morality. He thereby opened that field and as a result Crown counsel could have called evidence in reply to prove the bad general reputation of the appellant as to morality.

Inspector Mackay's evidence was something quite apart from the general reputation of the appellant for morality or otherwise and therefore was not in reply to evidence given by Davidson as to the general reputation. The questions put by Crown counsel to Davidson on cross-examination and Davidson's answers also had nothing to do with Tilley's general reputation. They related to something quite different. The general reputation of a person is something entirely different from an individual opinion. It is the sum total of the opinions of the public generally. Neither the appellant's own counsel nor Crown counsel could have asked Davidson what his personal opinion of the appellant was. Inspector Mackay's evidence in reply was by way of a contradiction of Davidson on a matter that was not in issue and therefore that evidence was inadmissible. When Davidson stated on cross-examination that he had no recollection of the interview suggested in the questions, the Crown was bound by that answer. This ground of appeal, though well taken, cannot, in my opinion, possibly affect the result of this appeal.

The third error of which counsel complains is that the medical witnesses were improperly allowed to state that, having heard the evidence adduced by the prosecution, they were of the opinion that the accused was a criminal sexual psychopath.

The facts as to the indecent assault on Elizabeth White had been proved in evidence beyond a reasonable doubt because the jury found the accused guilty of that offence. It was allowable for the psychiatrists to base their evidence in whole or in part, as they might choose, on that evidence. It was also allowable for Dr. Tennant to base his evidence in part on his examination of the accused. It was improper to ask the psychiatrists to base any opinion on other alleged facts, as to which evidence was given on the issue. The proper course for Crown counsel to have followed was to put those alleged facts to each of the psychiatrists hypothetically, not *en bloc*, asking them to assume one or more of them to be true and to state their opinion thereon. It was for the trial judge alone to determine what the facts actually were and make his finding, aided by the expert opinion

of the psychiatrists, on the facts as determined by him, whether or not the accused was a criminal sexual psychopath: Phipson on Evidence, 9th ed. 1952, p. 408; *Regina v. Frances* (1849), 4 Cox C.C. 57.

Fortunately, the course here followed is not fatal to the decision reached by the learned trial judge because on the whole the learned trial judge, in his reasons, has found the facts as related by the Crown witnesses on the trial and on the issue, on which the psychiatrists based their opinion, to have been proved.

Notwithstanding the errors of which counsel complained, I am of the opinion that they did not result in any substantial wrong or miscarriage of justice and that the appeal against sentence should be dismissed.

J. K. MACKAY J.A.: I have had the privilege of reading the exhaustive and carefully-reasoned judgment of my brother Roach.

Not without doubt I concur in the dismissal of this appeal. My doubt is predicated on the following bases:

1. Inadmissible evidence and irregularities during the course of the trial.

2. The volume of evidence for the prosecution, material in character and in some respects contradictory, given by prostitutes, and the questionable character of the Crown witness Lynch.

3. No direct evidence of an earlier tendency towards such conduct—any such tendency which may be gathered from the evidence of Dr. Cathcart is largely conjectural and based in his own language on “the sophisticated language” of the appellant and “the way he goes about the thing”.

4. The substantial quantity of liquor admittedly consumed by the appellant during the period under review, which degree of intoxication may have superinduced immoral conduct otherwise completely under control.

*Appeal dismissed.*

*Solicitor for the appellant: G. A. Martin, Toronto.*



## [COURT OF APPEAL.]

## Nicol et al. v. Bowman.

*Motor Vehicles — Rules of the Road — Making Left Turn on Highway — Precautions to be Observed — Necessity for Signal — Rights of Following Driver — Required Equipment — Rear-view Mirror — The Highway Traffic Act, R.S.O. 1950, c. 167, ss. 13(1)(b), 41(1).*

A driver on the highway, where other traffic, moving at a fairly high speed, may be reasonably anticipated, if he proposes to turn to the left, must look into his rear-view mirror in ample time before commencing the turn, and, if there is traffic approaching from the rear, must signal his intention to turn in time to give the following driver adequate warning of his intention, or wait until the other driver has passed. The driver of the following vehicle is entitled to assume that this will be done, and will not be guilty of negligence contributing to the collision if the leading vehicle, without previous signal, suddenly begins to turn at practically the same moment that he gives his signal.

*Coates et al. v. Toronto, St. Catharines Transport Ltd. et al.*, [1941] O.R. 371; *Falsetto v. Brown et al.*, [1933] O.R. 645; *Pritchard v. Boucher et al.*, [1939] S.C.R. 265; *The King v. Anderson*, [1946] S.C.R. 129; *Swartz Bros. Limited et al. v. Wills*, [1935] S.C.R. 628, applied.

AN APPEAL by the plaintiffs from the judgment of Barlow J. dismissing the action. The plaintiffs were Mary Anne Nicol, Jane Nicol by her next friend R. T. Nicol, and R. T. Nicol.

9th and 10th April 1953. The appeal was heard by PICKUP C.J.O. and HOGG and F. G. MACKEY JJ.A.

*B. O'Brien, Q.C.*, for the plaintiffs, appellants: The defendant admits that he did not see our vehicle at any time before the collision. Although his truck was equipped with a rear-view mirror, he said that there was a "blind spot" behind him of at least 150 feet and possibly 300 or 400 feet. He was well aware of this fact before the collision. The Highway Traffic Act requires him to ascertain, before making a turn, that it can be made safely. The defendant says he gave a signal, but there is no finding that it was plainly visible to the plaintiff driver, and the two passengers in the plaintiffs' car swear that they saw no signal. There is no evidence that if the defendant extended his hand from the cab window it could be seen from behind the rack of the truck. [F. G. MACKEY J.A.: From the photographs it would appear doubtful whether the driver could reach out far enough.] Presumably the manufacturer contemplated adequate rear vision, since the truck had a large back window, but this was obstructed by the stake body and a tarpaulin. There is also evidence that the body of the truck was at one time extended by four feet.

Slowing up is not necessarily a warning of an intended turn. [F. G. MACKAY J.A.: Particularly when it takes place near an intersecting road.]

The evidence as to the plaintiff driver's speed is too scanty to permit any inference that she was negligent.

I rely on ss. 13(1) (b) and 41(1) (d) of The Highway Traffic Act, R.S.O. 1950, c. 167. The defendant's failure to observe the provisions of s. 41(1) (d) was a proximate cause of the accident. The trial judge failed to give effect to these acts of negligence on the defendant's part: *Coates et al. v. Toronto, St. Catharines Transport Ltd. et al.*, [1941] O.R. 371 at 374, [1941] 4 D.L.R. 483.

*F. J. Hughes, Q.C. (R. E. Holland, with him)*, for the defendant, respondent: This appeal has been largely argued on the question whether our signal was "plainly visible"; this is a new point, not mentioned either in the record or at trial. [PICKUP C.J.O.: It was pleaded.] It is not enough to plead a ground of negligence, and then say nothing about it at the trial. The burden is on the plaintiffs to prove negligence: *Browne v. Dunn* (1893), 6 Rep. 67 at 70. The only evidence as to whether the signal was "plainly visible" is to be gathered from the photographs. [F. G. MACKAY J.A.: One of the occupants of the car says that she was looking and saw no signal.] What she said was, "I observed no signal." If a witness is to be impeached it must be done while he is in the witness-box, and he must be given an opportunity to explain.

In any event, the plaintiff driver saw enough to put her on her guard. She saw the defendant move toward the centre-line and slow down. Further, she did not see the intersection sign, and chose a bad time to pass. The standards to be applied are not those of perfection: *McMillan v. Murray*, [1935] S.C.R. 572 at 574, [1935] 4 D.L.R. 666. This Court must find that the trial judge was clearly wrong before reversing him: *Powell et ux. v. Streatham Manor Nursing Home*, [1935] A.C. 243 at 249.

[F. G. MACKAY J.A.: There are two points that bother me. Even if the plaintiff's evidence is disregarded, the defendant said that he did not look or signal until he was within 75 feet of his turn. This was on a provincial highway. The plaintiffs' car skidded on the left side of the road for 110 feet. When the defendant first looked, or said he looked, the plaintiff was in the act of passing him, and to give a signal then was clearly futile.

The second point is that if a driver on a provincial highway does not look until 75 feet before he makes a sudden manoeuvre there is almost bound to be an accident if another car is close behind, as is quite probable.] The defendant slowed down to 5 miles an hour, and the plaintiff driver came a long distance while the signal was being given. She must have been a long way back when he first signalled. [F. G. MACKAY J.A.: He would not have made the turn if he had known that the plaintiff's car was there, and he should have known it was there. He should have looked 1,000 feet before making the turn.]

*B. O'Brien, Q.C.*, in reply: The burden in this case is on the defendant. It was pleaded, and there was evidence, that no signal was given or observed. There is consequently an onus on the defendant to show that he complied with the statute. All he said was that he put his hand out; he did not show that it was plainly visible. [F. G. MACKAY J.A.: Is that not your whole case: the truck-driver did not see whether it was safe for him to make the movement; the statute requires a signal of the intention of turning, not a signal at the time of turning; the signal must be given far enough ahead to constitute adequate warning.] Precisely. I am not impeaching what the defendant says. I accept his evidence, but say that he has not shown what he is required to show in order to escape liability.

*Cur. adv. vult.*

13th May 1953. PICKUP C.J.O.:—I have had the privilege of reading the reasons for judgment of my brother Hogg and of my brother F. G. MacKay. For the reasons given by my brother MacKay, as supplemented by my brother Hogg, I would allow this appeal with costs, and direct judgment to be entered for the plaintiffs for the amount of damages assessed by the learned trial judge, together with the costs of the action.

HOGG J.A.:—I have had the advantage of reading the clearly-reasoned judgment of my brother F. G. MacKay and I agree with his reasoning on the evidence and in the result at which he has arrived. I wish, however, to state briefly why I do not consider that any degree of fault on the part of the appellant contributed to the accident.

The learned trial judge was of the opinion that the cause of the mishap was the manner in which, and the speed at which,



the appellant drove her car immediately before, and at the time of, the collision between the vehicles.

The sole point in this connection, as I see it, is whether the appellant was negligent or showed want of care in any degree that contributed to the accident, by not slowing down her speed, even though no signal of a left-hand turn was given by the respondent at such time as would enable the appellant to have avoided the collision. The following elements were present:

- (1) There was an intersection not far ahead of the truck.
- (2) The truck moved closer to the centre-line.
- (3) The truck slowed down its speed.

I do not think the fact that the truck moved closer to the centre-line of the road would be an indication that it might turn to the left, for the reason that the east half of the road is only 10 feet in width, and even when the truck was proceeding in the centre of the east half of the road, its west edge or side, because of its width, would not be far from the centre-line.

Are the facts that there was an intersection close ahead and that the truck slowed its speed sufficient grounds, alone, upon which to hold that the appellant should have anticipated that the truck might make a left-hand turn? So to hold would impose upon the appellant, seeking to pass the truck going in the same direction, an obligation that is not to be found in the statute.

It is conceivable that the appellant, had she been a singularly cautious driver, might have been put on her guard by the fact that when the truck slowed its speed in front of her, with an intersection close ahead, and, although there was nothing else, before the truck commenced to turn left across the road in front of the appellant, to signify that such a turn would be made, would have slackened the speed of her car to such a degree that she would be able so to control it that—no matter what the truck might do—there would be no danger of a collision. I do not think the law stated by the many judgments in motor car cases imposes care of so very high a degree upon the appellant when she endeavoured to pass the respondent's truck that the omission to act in the manner I have suggested could be held, in view of all the facts of this case, to be an act of negligence which, in any degree, contributed to the accident.

Robertson C.J.O. in *Coates et al. v. Toronto, St. Catharines Transport Ltd. et al.*, [1941] O.R. 371, [1941] 4 D.L.R. 483, held that there was an imperative duty on the driver ahead, when about to make a left-hand turn, to see that he could do so safely and a neglect of such duty was held by him to be the direct or proximate cause of the accident in the case which was then before the Court. There is no doubt that in the present case the truck-driver neglected this imperative duty.

It is true in the present case that, if the plaintiff had been going at a slower speed, she could possibly, and would probably, have stopped her car before it hit the truck, but the question is: Does the law oblige her, under the circumstances present in this case, to have done so in order to escape some degree of liability? If not, the mere fact that it was the cautious thing to do, but was not done, if it imputes negligence at all, does not impute negligence that contributed to the accident.

The evidence of the defendant makes it very clear that he did not give any warning till he was less than 75 feet from the intersection and that at the same time as, he says, the signal was given by him he commenced to turn left.

The appellant's car had been on the passing, or west, lane some time before the truck commenced to turn; how far distant from the truck is not definite, although two portions of evidence touch this point.

The passenger in the appellant's car said in evidence: "I was talking to my friend and I looked up to see what she [the driver] honked at, and there was plenty of time for a signal because we went out in the left-hand lane after she honked the horn and there was no signal given."

The other bit of evidence bearing on this particular topic of speed is that the skid-marks of the plaintiff's car extended some 110 feet back from the point of the collision. The passenger testified that the brakes were applied when the appellant's car was in the passing lane, and "when [the driver] realized the truck was about to turn".

Under these circumstances where the truck was on its own or east side of the road at a distance of less than 75 feet from the intersection, no warning or signal having been given up to this time of any left turn to be made, and when the appellant's car was in the west or passing lane and about to pass the truck,

I do not think *at this time* the plaintiff was legally obliged to have her car under such control, in so far as its speed is concerned, that even when the truck did turn suddenly to the left she could avoid a collision. To hold that there was negligence on the part of the appellant which contributed to the mishap would, in my view, impose an obligation upon the appellant, in the circumstances of this case, which is greater than that imposed under the present state of the law.

The following passage from the judgment of Mr. Justice Davis in *Falsetto v. Brown et al.*, [1933] O.R. 645 at 658, [1933] 3 D.L.R. 545, seems to me to be relevant. He said: "An owner or driver of a motor vehicle may be negligent, but his negligence may not cause the accident. . . . After all, the question is: Who was responsible for the accident? and it is answered in motor vehicle cases in nearly every case upon the particular facts. The decision 'must turn not simply on causation but on responsibility' and evidence of what is often called *causa sine qua non* may become as regards responsibility 'merely evidential or matter of narrative' as said by Lord Wright in delivering the judgment in the House of Lords in the very recent case of *McLean v. Bell* (1932), 48 Times L.R. 467."

F. G. MACKAY J.A.:—This is an appeal by the plaintiffs from the judgment of Barlow J. dated the 25th November 1952, dismissing the action with costs after a trial without a jury.

The action is for damages arising out of an automobile accident which occurred on provincial highway no. 48, about three miles south of Beaverton at about 5.50 p.m. on 9th October 1951.

The highway at the place of the accident runs north and south. The paved surface was 20 feet in width and the road was straight and level for a distance of at least half a mile south of the place of the accident. Prior to the accident the plaintiff was driving north in a motor car. The defendant was also driving north in a large truck. The two vehicles collided when the truck made a left-hand turn into a side-road when the plaintiff's car was about to pass it, the right front of the car colliding with the left rear of the truck at a point near the westerly edge of the pavement on highway no. 48, the front wheels of the truck at the time of the collision being on the gravel side-road. There was evidence that the car had made



skid-marks or brake-marks leading up to the point of impact for a distance estimated by the police officer at 60 feet and other witnesses at 110 feet. These marks were on the west side of the pavement.

The plaintiff Mary Anne Nicol, who was the driver of the car, suffered a severe concussion and was unable to give any evidence in regard to how the accident occurred. Her two passengers gave evidence that their driver had turned to the left, had blown the horn and was about to pass the truck when it suddenly, and without giving any signal that they saw, turned left into the side road.

The evidence of the defendant was that he was familiar with the road; that his truck was a large one and that by reason of the width of the body of the truck the rear-view mirror was ineffective to the extent that he was unable by looking in it to see a vehicle behind him unless it was some distance back. In his evidence in chief he said that this distance, which he referred to as a blind spot, extended for a distance of 150 feet behind the truck but on discovery and in cross-examination he said about 300 to 400 feet. The rear-view mirror, therefore, did not comply with the requirements of s. 13(1) (b) of The Highway Traffic Act, which requires: "a mirror securely attached to the vehicle and placed in such a position as to afford the chauffeur or operator a clearly reflected view of the roadway in the rear, or of any vehicle approaching from the rear."

He said that as he approached the cross-road into which he intended to turn he slowed up, pulled over so that the left side of his truck was at the centre of the road and when he was about 75 feet from the cross-road he looked in his rear-view mirror and when he was somewhat less than 75 feet from the cross-road he put out his hand to indicate a left-hand turn and, on reaching the cross-road, made a left-hand turn. He did not either see or hear the plaintiff's car before the collision.

Accepting the defendant's evidence, as the learned trial judge did, I do not think that the defendant can escape liability. It is a reasonable inference from the evidence that had the driver of the car known that the truck intended to turn left into the side-road she would not have attempted to pass when she did, nor would the driver of the truck, had he known that the car was behind him, have attempted his left-hand turn. The relevant provisions of the rules of the road as they apply to the defendant

in this case are contained in s. 41(1) of The Highway Traffic Act, as follows:

“(c) The driver or operator of a vehicle intending to turn to the left into an intersecting highway shall approach such intersection as closely as practicable to the centre line of the highway and the left turn shall be made by passing to the right of such centre line where it enters the intersection, and upon leaving the intersection by passing to the right of the centre line of the highway then entered.

“(d) The driver or operator of a vehicle upon a highway before turning to the left from a direct line shall first see that such movement can be made in safety, and if the operation of any other vehicle may be affected by such movement shall give a signal plainly visible to the driver or operator of such other vehicle of the intention to make such movement.

“(e) The signal required in clause *d* shall be given either by means of the hand and arm in the manner herein specified or by a mechanical or electrical signal device which has been approved by the Department.

“(f) Whenever the signal is given by means of the hand and arm the driver or operator shall indicate his intention to turn by extending the hand and arm horizontally from and beyond the left side of the vehicle.”

Clause *d* applies to left turns including turns at intersections and to following as well as approaching traffic: *Pritchard v. Boucher et al.*, [1939] S.C.R. 265, [1939] 3 D.L.R. 129.

The defendant did not comply with these provisions. Having in mind that he was on a through highway where the speed-limit was 50 miles per hour and he might reasonably anticipate that there might be other traffic moving at a fairly high speed, and that his rear-view mirror was not effective to ascertain whether there was traffic immediately behind him, a reasonably careful and prudent driver would have looked in his mirror long before he did and, if there was traffic approaching from the rear, would have signalled in ample time to give the following driver adequate warning of his intention to turn. Both his looking and his signalling were done at a time and place where they were likely to be, and in this case were, a totally inadequate compliance with the relevant provisions of s. 41 of The Highway Traffic Act, and with the standard of care to be expected of a reasonably prudent and careful driver under the circumstances.

In *The King v. Anderson*, [1946] S.C.R. 129 at 133, Estey J. said: "The respondent on his part was entitled to rely upon the appellant complying with these provisions of section 3(j), 'to ascertain' if the turn could be made 'in safety' and also 'give a signal plainly visible'."

In *Coates et al. v. Toronto, St. Catharines Transport Ltd. et al.*, [1941] O.R. 371 at 374, [1941] 4 D.L.R. 483, Robertson C.J.O. said: "When it is established, as it is here, that the driver of the car ahead has turned to the left into the path of the car that is passing, and has neglected his statutory duty to see first that the movement can be made in safety, the onus, in my opinion, is then upon the driver of the car that is ahead. It was his act that directly brought about a collision and made it unavoidable. The most that can be said of the failure of appellants' driver to sound the horn is that he might have aroused the respondent driver to a sense of his duty to look. But that duty to look did not arise from nor depend upon the prior sounding of the horn. There is an imperative duty on a driver when about to turn to the left to see that it is safe to turn to the left. The neglect of this duty by the respondent driver was the direct cause of the accident."

The learned trial judge has found the driver of the plaintiffs' car negligent in that she was travelling at too high a rate of speed; that she should have seen a sign indicating the cross-road; that the defendant's truck was slowing up and that it had pulled over to the centre-line, and under these circumstances she should have anticipated that the truck would make a left turn, and not have attempted to pass. With respect, I cannot agree. There is no evidence to justify a finding that the speed of the plaintiff's car, in the circumstances of this case, contributed to the accident unless it can be said that the driver of that car should have known in sufficient time for her to act on the knowledge that it was not safe for her to pass the truck at this intersection. Vehicles on a highway may slow up for many reasons other than the preparation for a left-hand turn, such, for instance, as a right-hand turn. Having in mind the width of the pavement and the size of the truck, moving over to the centre-line might well mean such a slight movement from the normal driving position on the road as to be unnoticeable. She was entitled to expect that if he intended to make a left-hand turn, he would see that



the movement could be made in safety in compliance with the law.

In *Swartz Bros. Limited et al. v. Wills*, [1935] S.C.R. 628 at 629, [1935] 3 D.L.R. 277, Duff C.J.C., after quoting the relevant section regarding right of way, said: "I can perceive no ambiguity or obscurity in this language. The driver approaching an intercommunicating highway is to keep a lookout for drivers approaching upon the right upon that highway and to make way for them. If everybody does this a collision is not only improbable, it is hardly possible. The respondent failed in this plain duty. This neglect of duty was the direct cause of the collision."

And Cannon J. at p. 632 quoted a statement of Lord Atkinson in *Toronto Railway Company v. King et al.*, [1908] A.C. 260 at 269, as follows: "... traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets."

Applying these principles in this case I think the driver of the plaintiffs' car was entitled to assume that the driver of the truck would look and see her car when he was still a sufficient distance from the cross-road to enable him to determine whether he could make his turn without danger of a collision, in which case he need not signal, or if the following car was so close that there was danger of a collision he was bound either not to make the turn until the car had passed or to give a signal plainly visible in sufficient time for the driver to take the necessary action to avoid a collision. He did not see her, which he should have done, and in any case he delayed both looking and signalling to the point where both actions were completely ineffective in avoiding a collision and I am of the opinion that his negligence was the sole effective cause of the accident.

The appeal should, therefore, be allowed with costs and judgment should be entered for the plaintiff for the amount of damages assessed by the learned trial judge, together with the costs of the trial.

*Appeal allowed with costs throughout.*

*Solicitors for the plaintiffs, appellants: Phelan, O'Brien, Phelan & Fitzpatrick, Toronto.*

*Solicitors for the defendant, respondent: Hughes, Agar, Amys & Steen, Toronto.*

## [COURT OF APPEAL.]

**Re Algoma Ore Properties Limited and Smith.**

*Real Property — Title — Sufficiency — Interests Unregistered and Unacknowledged for More than Forty Years — The Investigation of Titles Act, R.S.O. 1950, c. 186, s. 2.*

The Investigation of Titles Act requires a search only to the first root of title prior to the 40-year period preceding the search. The purchaser is entitled to rely on the form of the instruments registered and is not bound to inquire into their substance, and if the instrument on which he relies as the root of the title prior to the 40-year period is sufficient to convey the fee, including the mineral rights, he is entitled to rely upon it.

By a will registered in 1886 H devised his land to his daughter B subject to a reserve of "all mines and minerals with all privileges necessary for carrying on mining operations with access to mines at all times". By a subsequent clause in the will he devised the mining-rights for the benefit of four other children. In 1900 B conveyed the land in fee to A, who in turn conveyed it to S in 1917.

*Held* S could, in 1952, convey to a purchaser good title to the land, including the mining-rights. The 1900 and 1917 deeds, being in the ordinary statutory form, would have been effective to convey the mining-rights if the respective grantors had owned them, but at that time, because of the effect of what was now s. 4(3) of The Conveyancing and Law of Property Act, they conveyed only such rights as the grantors owned. The descendants of the devisees of the mining-rights could still have asserted their claims in 1952 had it not been for The Investigation of Titles Act, but that Act operated as a bar to any claim they might have had under H's will because, during the 40-year period and thereafter, B and her successors in title had been continuously shown on the books from time to time as the owners of the mining-rights. When the 1900 and 1917 deeds were registered the owners of the mining-rights were no longer shown "continuously" on the books as owners, and since they had not filed a notice of their claim as provided by s. 2(5) of the Act they lost their rights and the deeds became effective to convey the mining-rights.

*Real Property—Possible Estates in Land—Possibility of Separate Fees in Surface-rights and in Minerals and Mining-rights.*

*Mines and Minerals—Property-interests—Possibility of Freehold Estate in Minerals and Mining-rights, Separate from Ownership of Surface.*

There can be a severance of mines and minerals from the ownership of the surface of land and the mines and minerals so severed are a separate tenement capable of being held for the same estates as other hereditaments. It is accordingly possible to have the fee simple in the surface vested in one person and the fee simple in the mines and minerals in another. *Stoughton v. Leigh* (1808), 1 Taunt. 402 at 409; *Ex parte Jackson* (1925), 21 Alta. L.R. 168; *The Township of Bucke et al. v. The Macrae Mining Company Limited*, [1927] S.C.R. 403; *Cavana et al. v. The Township of Tisdale et al.*, [1942] O.R. 31, affirmed [1942] S.C.R. 384, applied.

AN APPEAL by a vendor from an order of Judson J., [1953] 2 D.L.R. 543, on an application under The Vendors and Purchasers Act, R.S.O. 1950, c. 407.

8th April 1953. The appeal was heard by PICKUP C.J.O. and HOGG and F. G. MACKAY JJ.A.

C. L. Yoerger, Q.C., for the vendor, appellant: Section 2 of The Investigation of Titles Act, R.S.O. 1950, c. 186, is a complete

answer to the purchaser's requisition. The deed from Braiden to Arnott, registered on 13th November 1900, formed a good root to the vendor's title to the lands and to every right, title and interest in them, including minerals and mining-rights. The claim of Holden's four children (and their descendants) to the mining-rights, although it had been in existence since 1886, has not been acknowledged, specifically referred to or contained in an instrument registered against the lands within the 40-year period, and no notice of the claim has been registered. The claim was therefore barred under the Act, and no release from the claimants, as required by the purchaser, is necessary to complete the vendor's title.

I also rely on: The Conveyancing and Law of Property Act, R.S.O. 1950, c. 68, ss. 1(6), 4(3), (4), (5), 14(1), (2); The Short Forms of Conveyances Act, R.S.O. 1950, c. 360, s. 1(a) and sched. "B", col. 2; The Investigation of Titles Act, s. 1(a), (c), (d); Cheshire, *Modern Law of Real Property*, 6th ed. 1949, p. 97; *The Township of Bucke et al. v. The Macrae Mining Company Limited*, [1927] S.C.R. 403, [1927] 3 D.L.R. 1; *Cavana et al. v. The Township of Tisdale et al.*, [1942] O.R. 31, [1942] 1 D.L.R. 465, affirmed *sub nom. The Township of Tisdale et al. v. Cavana et al.*, [1942] S.C.R. 384, [1942] 4 D.L.R. 65; *New-comen v. Coulson* (1877), 5 Ch. D. 133 at 142.

*A. T. Hewitt*, for the descendants of the devisees of the mining-rights, respondents: The executors were empowered to sell the mining-rights for the benefit of the four children, but they do not appear to have exercised their power. There was an express reservation of mining-rights in the conveyance to Braiden, and she could convey no more than she had. The registration of the will put names on the title as owners of these mining-rights, and therefore we come within s. 2(2) of The Investigation of Titles Act. There is no claim here to have acquired title by possession.

The vendor says he is not required to show title beyond the 40-year period. That is correct for surface-rights, but the position is different for mining-rights.

*A. A. McNab*, for the purchaser, respondent, submitted his client's rights to the Court.

*C. L. Yoerger, Q.C.*, in reply.



15th May 1953. PICKUP C.J.O. agrees with F. G. MacKAY J.A.

HOGG J.A.:—This appeal is from an order dated the 19th February 1953, made by Mr. Justice Judson upon a motion brought under the terms of The Vendors and Purchasers Act, R.S.O. 1950, c. 407, by Algoma Ore Properties Limited, the purchaser under an agreement of sale of certain lands situate in the township of Bagot, in the county of Renfrew, owned by the vendor, Walter Smith.

The purchaser has objected to the title of the vendor to the minerals and mining-rights in the said lands on the ground that there exists an outstanding claim to such minerals and mining-rights. Mr. Justice Judson declared that the objection to the title was a valid objection and had not been satisfactorily answered.

The following portion of the reasons for judgment of the learned judge who heard the motion sets out in a concise manner the essential facts:

"On 17th October 1885 Elias Holden received a patent for the west half of lot 15, concession 9, in the township of Bagot in the county of Renfrew. He devised the lot to his daughter Zelicia Braiden 'subject to the following reserve that is—all mines and minerals with all privileges necessary for carrying on mining operations with access to mines at all times'. By a subsequent paragraph in the will the mining-rights were devised to four other children. The will is dated 21st November 1885. It was registered against the lot 27th December 1886. Mrs. Braiden granted the lot in fee to John Arnott in 1900. John Arnott granted it in fee to Walter Smith in 1917. Neither grant referred in any way to the mining-rights. Walter Smith now proposes to sell to Algoma Ore Properties Limited."

The neat point or problem presented to this Court for solution is concerned with the construction of s. 2 of The Investigation of Titles Act, R.S.O. 1950, c. 186, which reads in part:

"(1) From and after the 1st day of June, 1930, no person in dealing with land shall be required to show that he is lawfully entitled to such land as owner thereof through a good and sufficient chain of title, save and except during the period of forty years immediately preceding the date of such dealing as aforesaid, and no claim which has been in existence longer than the forty year period shall affect such land, unless such

claim shall have been acknowledged or specifically referred to or contained in an instrument registered against such land within the forty year period or unless a notice is registered against such land as provided in subsections 5, 6, 7 and 9.

“(2) Where a person is shown by the books of a registry office to be the owner of a freehold or leasehold estate in land or of any equity of redemption therein prior to any forty year period and is continuously shown on the books from time to time during the forty year period and thereafter as the owner of either a freehold or leasehold estate in the same land or of an equity of redemption therein or any of them, such person’s claim to the land shall not be affected by failure to register the notice as required by subsection 1.”

The above-quoted s. 2 is one of limitation and under certain circumstances not only is the right to assert a claim to an interest in land barred but the claim itself is extinguished.

It is to be noted that the learned trial judge in his outline of the essential facts, which I have quoted, states that the mining-rights in the land were devised to four children of Elias Holden. Holden’s will directed that the mining-rights were “to be disposed of to the best possible advantage and the proceeds divided” among the four children mentioned in the will. This will does not give power to anyone to sell the mining-rights and there is no evidence that such a sale was ever made. I am of the opinion that the executors of the will would have by implication the power to sell, but would have no further interest in the mining-rights: Williams on Executors, 11th ed. 1921, p. 499. The will is dated the 21st November 1885 and was registered on the 27th December 1886. There is evidence that Elias Holden died prior to the 20th December 1886. It is my view that upon the death of Elias Holden these four children had a claim which affected a freehold interest in the land in question.

The issue to be decided by this Court may be stated as follows: Does the claim of the four children of Elias Holden or their descendants respecting the minerals and mineral rights appertaining thereto affect the aforesaid land, or has this claim been extinguished?

I am in entire agreement with the view of the learned judge from whose order this appeal is taken, that a separate estate in fee simple may be held in mines and minerals in, on, or under

land, apart from the ownership of the surface. The word "owner" is interpreted by s. 1(d) of the Act as a person entitled to a freehold or other interest in land.

The effect of s. 2 of the statute may be summarized, as it applies to the present case, as follows:

*Subsection 1:*

(1) The person dealing with the land must show that he is lawfully entitled to the land as owner through a good chain of title during the period of 40 years. In the present instance the 40-year period commenced in 1912.

(2) No claim in existence before the 40-year period (before 1912) will affect the land unless such claim has been acknowledged or is referred to in an instrument registered against the land within the 40-year period (since 1912) or unless a notice of the kind described in the statute is registered against the land.

*Subsection 2:*

(1) Where a person is shown on the books of the registry office to be the owner of land prior to the period of 40 years (prior to 1912) and is continuously shown as the owner of a freehold interest during the period of 40 years (since 1912), the claim of such person is not affected by the failure to register the said notice.

Subsection 1 deals with a claim which has been in existence prior to the 40-year period. Subsection 2 deals with a freehold or leasehold estate in land prior to and during the 40-year period.

The provisions of subs. 1 are those applicable to the present case.

Turning now to the application of the terms of s. 2 of the statute to the facts of this case, it is to be kept in mind that 40 years prior to November 1952, the date of the agreement for sale between the parties, brings us to the year 1912.

The four children of Elias Holden are shown by the afore-said will, which is registered, to hold, prior to the 40-year period mentioned in s. 2(1) of the statute, that is to say, prior to the year 1912, a claim affecting a freehold estate in the land. While the 40 years were running this claim was not acknowledged, nor is it "specifically referred to or contained in an instrument registered against such land within the forty year period". No reference of any kind is made to this claim in any registered



instrument since the year 1886 and no notice, as provided by the Act, has been registered against the land with respect to such claim.

In the year 1900 Mrs. Braiden conveyed the land to John Arnott. This grant purported to convey all rights in the land, including minerals and mining-rights. This instrument was prior to the commencement of the 40-year period. The first instrument registered within the 40-year period is a deed of conveyance in 1917 by which Arnott conveyed the land to the present vendor, Walter Smith, and again the deed purported to convey all interest and rights in the land; no mention is made of a reservation of minerals and mining-rights.

Because of facts which I have stated, in conjunction with the terms of s. 2(1) of The Investigation of Titles Act, I am of the opinion that the consequences of the failure of the four devisees of the aforesaid claim or their descendants to register the notice required by s. 2 of the statute is that the claim of the four devisees or their descendants to any interest which they may have had in the minerals or mining-rights in or under the lands in question has expired. That the expiry of the claim is the result of a failure to register a notice when such notice should have been registered is apparent from the language of subss. 9 and 11 of s. 2 of the Act. The claim could not be affirmed after the expiration of the 40-year period as provided by subs. 9 because of the "intermediate registered dealing" with the land by Arnott and Smith.

The word "claim", as it is used in the statute, means, *inter alia*, according to s. 1(a), "any right, title, interest, claim or demand of any kind or nature whatsoever affecting land set forth in, based upon or arising out of a registered instrument". If the term "expired" is given its meaning when used in relation to the title to land, the claim has become extinguished. The statute would seem to have the same effect as s. 15 of The Limitations Act, R.S.O. 1950, c. 207.

The appeal should be allowed and judgment should be pronounced declaring that the requisition of the purchaser has been satisfactorily answered. For the reason that all parties were entitled in the circumstances, or were even required, to ask the judgment of the Court in this matter, there should be no costs of the motion or of the appeal.

F. G. MACKEY J.A.:—This is an appeal from the order of Judson J. on a motion under The Vendors and Purchasers Act. There are no facts in dispute. [His Lordship stated the facts as quoted above from the judgment of Judson J. and proceeded:] Smith claims to be able to give a good title to the mining and surface rights. On the motion before Judson J. under The Vendors and Purchasers Act, the descendants of the beneficiaries of the devise of the mining-rights were represented and asserted that their rights were still subsisting.

On the hearing of the motion Judson J. told counsel that he would not hold that the devise of the mining-rights was subject to a condition precedent. He then proceeded to consider the remaining question as to whether the vendor could show a good title to both surface and mining-rights under The Investigation of Titles Act. His opinion was that the vendor could not do so because by the will of Elias Holden there was a devise of a freehold estate in the land to the four children other than Zelicia Braiden and such freehold estate was exempt from the provisions of the Act requiring that notice of the claim be registered within the 40-year period. The Act reads: [see quotation in the reasons of HOGG J.A., *supra*].

The judge in the Court below referred to a case in 1808, *Stoughton v. Leigh*, 1 Taunt. 402 at 409, 127 E.R. 889, in which Mansfield C.J. said: "The grant of the stratum must be taken to be a grant of the fee simple." It is, I think, quite clear, as stated by Judson J., that there may be a severance of the mines and minerals from ownership of the surface and that the mines and minerals so severed are a separate tenement capable of being held for the same estates as other hereditaments: 22 Halsbury, 2nd ed. 1936, p. 535; Armour on Real Property, 2nd ed. 1916, p. 47. The right to sever and create fee simples in the surface and in mines and minerals has been recognized in *Ex parte Jackson*, 21 Alta. L.R. 168, [1925] 1 W.W.R. 337, [1925] 1 D.L.R. 701; *The Township of Bucke et al. v. The Macrae Mining Company Limited*, [1927] S.C.R. 403, [1927] 3 D.L.R. 1; and *Cavana et al. v. The Township of Tisdale et al.*, [1942] O.R. 31, [1942] 1 D.L.R. 465, affirmed *sub nom. The Township of Tisdale et al. v. Cavana et al.*, [1942] S.C.R. 384, [1942] 4 D.L.R. 65.

Judson J. reached the conclusion that the requisition as to ownership of the mines and minerals had not been satisfactorily answered. With respect, I am of the opinion that The Investigation of Titles Act is a complete answer to the purchaser's objection to the vendor's title in respect of the mineral rights. As was held by the judge in the Court below, the minerals or mining-rights when severed became a separate tenement in fee simple. If the judgment appealed from were correct The Investigation of Titles Act would have no application whatever to the estates or interests in land referred to in s. 2(2), namely, a freehold or leasehold estate or an equity of redemption, and the Act would apply only to other interests in land. This would make it necessary, notwithstanding the statute, to search all titles back to the Crown in respect of all freehold or leasehold estates or equities of redemption. I do not think that can be the meaning of the legislation. If that had been the result intended, it would have been very simple to exclude these interests from the definition of the word "claim" in s. 1(a). Subsection 2 of s. 2 would be unnecessary and the words in subs. 1 of s. 2 which read "no person in dealing with land shall be required to show that he is lawfully entitled to such land as owner thereof through a good and sufficient chain of title, save and except during the period of forty years immediately preceding the date of such dealing as aforesaid" would be meaningless.

The deeds from Mrs. Braiden to Arnott in 1900 and from Arnott to Smith in 1917 were in the ordinary statutory form and would have been effective to convey the mineral rights if the respective grantors had, at the time of giving the deeds, owned them. If the respective grantors under these deeds were not in fact the owners of the mineral rights, the deeds would convey only such rights as they owned: The Conveyancing and Law of Property Act, now R.S.O. 1950, c. 68, s. 4(3), and the owners of the mineral rights could still assert their claim if it were not for The Investigation of Titles Act. This Act operates as a bar to any claim they might have had under the will of Elias Holden because, during the 40-year period and thereafter, Mrs. Braiden and her successors in title, and not those who may have been entitled under the will of Elias Holden, have been continuously shown on the books from time to time as being the owners of the mineral rights.



When the deeds from Braiden to Arnott in 1900 and from Arnott to Smith in 1917 were registered, the owners of the mineral rights under the will of Elias Holden were no longer shown "continuously" on the books as being the owners and unless they followed the procedure set out in the Act and filed a notice of their claim as provided by s. 2(5) they lost their rights and the deeds from Braiden to Arnott and from Arnott to Smith became effective to convey the mineral rights.

I am of the opinion that The Investigation of Titles Act requires a search only to the first root of title prior to the 40-year period. The purchaser is entitled to rely on the form of the instruments registered and is not bound to inquire into their substance and if the instrument on which he relies as the root of the title prior to the 40-year period is on its face sufficient to convey the fee, including the mineral rights, he is entitled to rely upon it.

The appeal will, therefore, be allowed; the order of Judson J. will be set aside and an order will issue declaring that the requisition of the purchaser has been satisfactorily answered. The appellant should have his costs of the appeal and in the Court below.

*Appeal allowed with costs throughout.*

*Solicitor for the purchaser, respondent: A. A. McNab, Renfrew.*

*Solicitors for the vendor, appellant: Chown & Cooke, Renfrew.*

*Solicitor for the devisees of the mining-rights, respondents: A. T. Hewitt, Ottawa.*

[ANGER J.]

**Owen Sound General and Marine Hospital v. Mann et al.**

*Fraudulent Conveyances — Burden of Proof — Assumption of Mortgage by Grantees — Transaction between Near Relatives — Suspicious Circumstances — Shifting Burden.*

*Husband and Wife — Necessaries — Implied Authority of Wife to Pledge Husband's Credit — Medical Care — Hospital Expenses — Absence of Joint Liability.*

W, a married woman, was a patient in a hospital for several months, at the end of which time there was a balance of nearly \$2,000 owing on her account. The hospital issued a writ against W and her husband, H, for the amount of this account, and obtained judgment by default. Between the issue of the writ and the signing of judgment H and W conveyed a property, owned by them as joint tenants, to their daughter-in-law and their infant grandchildren. The hospital now sued to set aside this conveyance as fraudulent. None of the adult defendants filed a statement of defence, but a defence was filed by the Official Guardian on behalf of the infants.

*Held*, the action must succeed as to H's interest in the property, but not as to W's interest.

Although the conveyance was not a voluntary one, since the property was subject to a mortgage, impliedly assumed by the grantees, the conveyance was one between near relatives in suspicious circumstances, throwing on them the burden of establishing the *bona fides* of the transaction. The effect of Rule 354 was that the adult defendants, who had not defended the action, admitted that the intent was to defeat or defraud the plaintiff, and although there was no such admission on behalf of the infants, they had adduced no evidence to this end, and had therefore not discharged the onus.

The position of W, however, was different from that of H. There was nothing in the evidence to rebut the presumption that she had obtained the hospital care (which was a "necessary" within the authorities) as the agent of H and on his credit, and there was nothing to support a suggestion of joint liability for the account. The liability was therefore that of H alone, and the mere fact that the plaintiff's action had been commenced before the conveyance did not make the plaintiff a creditor of W at that time. The action should therefore be dismissed as to W's interest in the property conveyed.

Review of authorities.

AN ACTION to set aside a conveyance as fraudulent.

17th April 1953. The action was tried by ANGER J. without a jury at Owen Sound.

*M. A. Craig*, for the plaintiff.

*E. C. Carr, Q.C.*, for the Official Guardian.

The defendant Samuel Mann, in person.

22nd May 1953. ANGER J.:—This is an action to set aside, under The Fraudulent Conveyances Act, R.S.O. 1950, c. 148, a conveyance made by the defendants Samuel Mann and Eva B. Mann, as grantors, to the other three defendants as grantees, of whom the defendant May Mann is an adult and the defendants Eva Mann and Irene Mann are infants. No evidence was adduced by any of the defendants and the evidence adduced by the plaintiff was as follows:

The defendant Eva B. Mann, wife of the defendant Samuel Mann, was a patient in the plaintiff hospital from 2nd December 1949 to 31st October 1951. On her admission to the hospital she named the defendant Samuel Mann as her husband and next-of-kin. Presumably they were living together, there being no evidence to the contrary. The hospital carried its account in her name and billed her. On 31st October 1951 its account was for \$1,944.25, after deducting payments of \$2,132.20 made in 1950. It was not shown in evidence who made these payments, and for the purposes of this action, as I shall show, it is immaterial who made them.

On 31st October 1951, the plaintiff issued a writ against both husband and wife for the said sum of \$1,944.25, serving the husband with the writ on 2nd November 1951 and serving the wife on 8th November 1951.

At that time the husband and wife were seized of the real property at issue in this action as joint tenants. They conveyed the property by grant no. 45439, dated 8th November 1951 and registered on 14th November 1951, to their infant grandchildren, the defendants Eva and Irene Mann, and to their adult daughter-in-law, the defendant May Mann, mother of the infants, as joint tenants, for \$1, subject to an existing mortgage for \$1,000 and interest. It is this conveyance that I am asked to set aside.

On 17th December 1951 default judgment was signed against the defendants Samuel and Eva B. Mann for the said sum of \$1,944.25, interest and costs. The sheriff made a return of *nulla bona* on 2nd February 1953.

The writ in the present action to set aside the said conveyance was issued on 5th February 1953. The three adult defendants did not defend the action and the pleadings were noted closed as against them on 27th March 1953. The Official Guardian delivered a statement of defence on behalf of the two infants, consisting of a submission of their rights to the Court.

In these circumstances Rule 354 operates against the adult defendants. It provides that: "A defendant who fails to deliver a statement of defence and against whom the pleadings have been noted as closed, shall be deemed to admit all the statements of fact set forth in the statement of claim." The statement of defence delivered by the Official Guardian is, in my opinion, sufficient to prevent that Rule from operating against the infants who, therefore, admit nothing.



At this point, counsel for the plaintiff closed the plaintiff's case, relying, first, on the effect of Rule 354, that the adult defendants are deemed to admit the facts pleaded in the plaintiff's statement of claim, namely, that no consideration passed from the grantees to the grantors for the said conveyance which was voluntary and void as against the plaintiff (para. 7), that the conveyance was null and void as against the plaintiff, as having been made with intent to defeat, hinder, delay or defraud the plaintiff (para. 8), and that the grantors have remained in possession, use and occupation of the premises with the grantees in the same way as they did before the said conveyance (para. 9), and relying, second, on the law that, where a conveyance is voluntary, it is only necessary to show fraudulent intent on the part of the grantor, citing *Oliver v. McLaughlin et ux.* (1893), 24 O.R. 41, and that where a conveyance is to near relatives in suspicious circumstances, the burden of establishing its *bona fides* is upon the defendants, citing *Koop v. Smith* (1915), 51 S.C.R. 554 at 559, 24 D.L.R. 355, 8 W.W.R. 1203. The Official Guardian adduced no evidence, relying upon legal argument. I asked the defendant Samuel Mann, who appeared in person, whether he desired to testify, subject to objection, but he said there was nothing he could say except that he made the conveyance. I will deal first with the burden of proof.

Section 2 of The Fraudulent Conveyances Act, based upon the Imperial statute 13 Eliz., c. 5, provides that every conveyance of real or personal property made with intent to defeat, hinder, delay or defraud creditors of their just and lawful debts shall be null and void as against such persons and their assigns. Section 4, also based upon the Imperial statute, provides that s. 2 shall not extend to any estate or interest in real or personal property conveyed upon good consideration and *bona fide* to any person not having at the time of the conveyance to him notice or knowledge of such intent. Section 5 provides that s. 2 shall apply to all conveyances executed with the intent in that section set forth, notwithstanding that the same may be executed upon a valuable consideration and with the intention, as between the parties to the same, of actually transferring to and for the benefit of the transferee the interest expressed to be transferred, unless it is protected under s. 4 by reason of *bona fides* and want of notice or knowledge on the part of the purchaser.

The conveyance in this action was not voluntary but was based upon good and valuable consideration, apart from the monetary consideration of \$1. The conveyance was made subject to the existing mortgage of \$1,000 and interest thereon. It is stated in Falconbridge's Law of Mortgages, 3rd ed. 1942, p. 269, that in the absence of an express stipulation the general rule is that, if land is transferred subject to a mortgage, the transferee is under an implied obligation to indemnify the transferor against the latter's liability in respect of the mortgage (citing *Waring v. Ward* (1802), 7 Ves. 332 at 336, 32 E.R. 136; *Jones v. Kearney* (1841), 1 Dr. & War. 134 at 155; *Walker v. Dickson et al.* (1892), 20 O.A.R. 96 at 102), and that this rule is only an instance of the principle that, if a person buys property which is subject to a charge, and if it is the intention of the parties that the purchaser is to take the property *cum onere*, the purchaser is bound, irrespective of the form of the contract, to indemnify the vendor against the charge, for *ex hypothesi* the purchaser is only paying the value of the property less the amount of the charge and he is not entitled to get the property freed from the charge at the owner's expense (citing *Boyd v. Johnston* (1890), 19 O.R. 598; *Gooderham v. Moore* (1899), 31 O.R. 86). This implied obligation of the transferee is preserved by The Mortgages Act, R.S.O. 1950, c. 239, s. 18(2) of which provides that where a mortgagor has conveyed the equity of redemption in such circumstances that the grantee is by express covenant or otherwise obligated to indemnify the mortgagor with respect to the mortgage, the mortgagee has the right to recover from the grantee the amount of the mortgage debt, such right to terminate upon a further transfer of the equity of redemption by the grantee, unless an action is started by the mortgagee meanwhile. In the conveyance before me the grantees have that obligation, so the conveyance was based upon valuable consideration.

Adequacy of consideration is not necessary to uphold a transaction under The Fraudulent Conveyances Act : *Reaume v. Guichard* (1856), 6 U.C.C.P. 170; *Carradice v. Currie* (1872), 19 Gr. 108, although in some cases the inadequacy may be some evidence of guilty knowledge: *Carradice v. Currie, supra*; *Buckland v. Rose* (1859), 7 Gr. 440 at 447-8; *Black v. Fountain* (1876), 23 Gr. 174 at 176-7. Also the fact that the result of a

conveyance is to defeat creditors is not necessarily proof that the intent of the grantor was fraudulent: *Godfrey v. Poole et al.* (1888), 13 App. Cas. 497; *Carr et al. v. Corfield et al.* (1890), 20 O.R. 218; *Oliver v. McLaughlin et ux., supra*; *Crombie v. Young* (1894), 26 O.R. 194; *Montgomery v. Corbit* (1896), 24 O.A.R. 311; *Elgin Loan and Savings Company v. Orchard* (1904), 7 O.L.R. 695. Where a deed is not voluntary but is for value, there is no presumption of fraudulent intent from the fact that creditors are defeated by it; the intent must be deduced from the whole evidence as a fact and, although the fact that creditors have been defeated may be considered as an aid, that fact has not the conclusive effect which the Courts have attached to the fact in the case of voluntary settlements: *Beavis v. Maguire et ux.* (1882), 7 O.A.R. 704 at 707. The burden of proving fraudulent intent by the parties to a conveyance is ordinarily upon the plaintiff but nevertheless where there is a conveyance between near relatives which has the effect of defeating or delaying creditors, although there is no absolute rule that the burden of proof is upon the defendants, the principle of *res ipsa loquitur* may properly be applied to a transaction between near relatives in suspicious circumstances, so as to place upon the defendants the burden of establishing by corroborative evidence, other than the testimony of interested parties, the *bona fides* of the transaction: see the comment of Duff J. as he then was, in *Koop v. Smith, supra*, at p. 559, followed in *Kemp v. Reaume* (1931), 40 O.W.N. 482. Undue haste by the parties to a conveyance to assure a priority over creditors of the vendor, the fact that there is no immediate or early change of possession following the conveyance, and the relationship between the parties, are all factors relevant to show an intent to defeat or defraud creditors: *Ferguson v. Lastewka, et al.*, [1946] O.R. 577, [1946] 4 D.L.R. 531, in which LeBel J. reviewed the authorities.

In the case before me, in regard to the adult defendants, the effect of Rule 354 is that they admit that the intent of the conveyance in question was to defeat, hinder, delay and defraud the plaintiff. In regard to the infant defendants, having regard to the circumstances of the case, I feel I must, under the foregoing authorities, place upon the Official Guardian the burden of establishing the *bona fides* of the transaction. No evidence hav-



ing been adduced to that end, the conveyance must be set aside, but only in part, by reason of the following law.

Before The Married Women's Property Act, now R.S.O. 1950, c. 223, a wife living with her husband had a right, which was not taken away by that Act, to act as agent of her husband in acquiring goods or services with his express authority, and also had implied authority to act as his agent in acquiring necessities. The subject is comprehensively discussed in Eversley on Domestic Relations, 6th ed. 1951, pp. 205-215. The mere fact of cohabitation does not imply a general legal mandate making the wife an agent in law to bind her husband and pledge his credit: *Debenham v. Mellon* (1880), 6 App. Cas. 24; *Morel Brothers & Co., Limited v. Earl of Westmoreland*, [1904] A.C. 11, but, in regard to necessities, she has implied authority to pledge his credit. This is a delegated, not an inherent authority: per Lush J. in *Eastland v. Burchell* (1878), 3 Q.B.D. 432 at 435; per McCardie J. in *Miss Gray, Limited v. Earl Cathcart* (1922), 38 T.L.R. 562 at 565, and is, in fact, a rebuttable presumption of fact, arising from cohabitation, and that the wife has the husband's authority to order reasonable necessities on his credit: *Etherington v. Parrot* (1703), 2 Ld. Raym. 1006, 92 E.R. 169; *Phillipson v. Hayter* (1870), L.R. 6 C.P. 38; *Miss Gray, Limited v. Earl Cathcart*, *supra*; *Scott v. Allen* (1912), 26 O.L.R. 571 at 573, 5 D.L.R. 767.

McCardie J. said in *Miss Gray, Limited v. Earl Cathcart*, *supra*, at p. 565: "With characteristic accuracy . . . the point was stated in the work by Mr. Justice Lush on 'Husband and Wife', 3rd Ed., at p. 386, 'Where the parties are living together in the usual way, there is a presumption of fact that she has authority to pledge his credit for ordinary necessities.' In the words 'presumption of fact' lay the root of the matter."

Bayley J. said in *Montague v. Benedict* (1825), 3 B. & C. 631 at 635, 107 E.R. 867: "If the husband and wife live together, and the husband will not supply her with necessities, or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her support. But whenever the husband and wife are living together, and he provides her with necessities, the husband is not bound by contracts of the wife, except when there is reasonable

evidence to shew that the wife has made the contract with his assent”.

Most of the cases deal with necessities that are goods and they enunciate the clear principle that the husband is entitled to regulate the supply of necessities according to his means and status in life, that he may make an allowance for necessities and forbid the wife to exceed it and that he may inform the tradesmen that his credit is not to be pledged. Thus, it has been held that, while a husband and wife are living together, it is a presumption of fact that the wife is agent for and has the authority of her husband to pledge his credit for goods supplied to their establishment which are suited to her station and degree, that it is for the husband and not for the jury to fix what shall be the standard of living for the family and that it is a question of fact for the jury whether the presumption has been rebutted: *Harrison v. Grady* (1865), 13 L.T. 369.

Necessaries, however, include medical care. “It is perfectly clear that medical attendance is one of the most primary necessities”: per Erle C.J. in *Harrison v. Grady*, *supra*, followed in *Forristall v. Lawson*; *Connelly v. Lawson* (1876), 34 L.T. 903, and McCardie J. in *Miss Gray, Limited v. Earl Cathcart*, *supra*, included medical attention among necessities of life to the supply of which by her husband a wife is entitled. Obviously, medical attention must include that given by a hospital.

Accordingly, in a British Columbia case, *Seldon v. Zambowski*, 39 B.C.R. 205, [1928] 1 W.W.R. 630, [1928] 1 D.L.R. 638, where a married woman was under the necessity for having an operation performed by a surgeon on the advice of her attending physician, the trial judge dismissed the surgeon’s action against the husband for his account on the ground that the woman did not authorize the physician to call in the surgeon for the operation. On appeal, four judges of the Court of Appeal allowed the appeal on the ground that the case was one of agency of the wife and the husband must pay. Macdonald C.J.A. dissented, but solely on the ground that the trial judge’s conclusion that the wife had not authorized the operation should not be interfered with, for he said: “It is perfectly clear that notwithstanding that the wife had money of her own, her husband is liable for her necessities, including surgical operations. The wife therefore was the agent of the husband for the purposes

of engaging a surgeon. If she authorized her attending physician Dr. Milburn, to employ Dr. Seldon to perform the operation the husband is liable, but the doubt arises from the fact that she, as she says, meant merely to authorize Dr. Milburn to call in Dr. Seldon in consultation, he, Dr. Milburn having advised her that an operation might be necessary."

Apart from the presumption of fact as to the wife's authority, a husband may make her his agent by estoppel, by his conduct in holding her out as having apparent or ostensible authority to pledge his credit, in which case he is bound: *Jolly et al. v. Rees* (1864), 15 C.B. (N.S.) 629 at 640, 143 E.R. 931; *Morgan v. Chetwynd* (1865), 4 F. & F. 451 at 458, 176 E.R. 641; *Debenham v. Mellon*, *supra*, at pp. 32, 36-7. Such an apparent authority may be created by a course of dealing: *Miss Gray, Limited v. Earl Cathcart*, *supra*, at p. 565, and, if he knew that his wife had obtained credit and allowed a tradesman to suppose that he had sanctioned the transaction, by paying or otherwise, he may be held to have given such authority that, if he did revoke it, he would be bound to give notice of the revocation to those who acted on the faith of his authority or sanction: per Lord Blackburn in *Debenham v. Mellon*, *supra*, at pp. 36-7, and see the comment of Thesiger L.J. in the Court of Appeal in the same case, 5 Q.B.D. 394 at 403. She may have his express authority to pledge his credit, which may be inferred from his conduct implying his assent to the authority assumed by her: per Cockburn C.J. in *Morgan v. Chetwynd*, *supra*, at p. 459. If a wife, when obtaining necessities, merely gives her married name, she is *prima facie* deemed to contract merely as agent of her husband: *Paquin, Limited v. Beauclerk* (formerly *Holden*), [1906] A.C. 148.

This case of *Paquin, Limited v. Beauclerk* is very cogent in regard to the facts of the case before me, both in regard to the implied or ostensible authority of the wife and to the effect of The Married Women's Property Act. Section 3(1) of that Act provides that every married woman may, to the extent of her separate property, make herself liable on any contract and may sue or be sued as if she were a *feme sole*, thus freeing her from the control that her husband formerly had. Section 4(1) provides that every contract entered into by a married woman on or after 13th April 1897, *otherwise than as agent*, shall be deemed



to be a contract entered into by her with respect to her separate property and shall bind it. Thus, s. 4(1) corresponds with s. 1 of the English Married Women's Property Act, 1893, which was interpreted by the House of Lords in *Paquin, Limited v. Beauclerk, supra*.

In that case the defendant, a married woman had ordered various articles from the plaintiff in her own name (then Mrs. Holden) without indicating who her husband was. The articles were charged to her, she made payments herself, her then husband became insolvent and absconded, and she was sued by the vendor. She testified that she had no separate estate and thought she had contracted as agent. The plaintiff's manager admitted that he did not regard her as single or as a widow. The House of Lords confirmed the Court of Appeal to the effect that, since there was no evidence that she had contracted "otherwise than as agent", so as to bring the case within s. 1 of The Married Woman's Property Act, 1893, the wife was not liable for the debt. The judgments of the judges of the Court of Appeal are set forth in the report as well as those of the Lords.

In the Court of Appeal Collins M.R. said, after referring to the above provision of the Act: "Therefore, it seems to me that, if this contract was one made by the defendant as agent, we get back to the common law of this matter and there is no implication of liability upon the defendant at all . . . and it seems to me that from the provisions of the statute it is clear that the point is not whether the contract purported on its face to be made by the married woman as principal, but whether in point of fact it was made by her otherwise than as agent. Here there is no doubt whatever that this contract was made by her as agent, and, even if the inference from the contract, if written down, might, as regards its terms, have admitted of a possible personal liability, I do not think that is the crucial point. The crucial point is, Was it a contract of agency in fact, not in semblance or in form?— . . . it seems to me clear in this case that this was not a contract by the defendant otherwise than as agent. Therefore a case of liability has not been established against this lady." Mathew and Cozens-Hardy L.JJ. agreed with him.

In the House of Lords Lord Loreburn L.C. said at p. 159:

"If she was acting as an agent, the Act of 1893 will not apply. If she was acting otherwise than as agent, then the Act will

apply. I think it is clear that the plaintiffs are entitled to succeed in the present case if Mrs. Holden ordered these goods on her own account, and equally clear that they must fail if she ordered them as agent of her husband.

"Mr. Isaacs argued that, in order to prove that she entered into the contract as an agent, a married woman must establish, not merely that she was, in fact, an agent for her husband, but also that the other contracting party knew it, and contracted with her on those terms. I cannot adopt that view. The Act of 1893 does not mean that a married woman's separate estate is to answer her contracts unless both parties to the contract deal on the footing that she is an agent. It means, in my opinion, that her separate estate is not to answer when, in fact she entered into the contract as an agent."

Lord Macnaghten agreed and added, at p. 163: "Now, if this transaction had occurred just before the passing of the Married Woman's Property Act, 1893, there cannot, I think, be the slightest doubt what the result of an action by the tradesman would have been. It must have been held that the lady entered into the contract as agent. The husband, and the husband alone, would have been liable. The lady would not have been liable either at law or in equity. . . . It seems to me that, after the passing of the Act of 1893 such a transaction is still a contract of agency and nothing else."

In a dissenting judgment, Lord Robertson held that the wife was liable because the vendor did not know that she had a husband or was living in cohabitation with him, and so could not have dealt with her as an agent. Lord Atkinson agreed with that view, stating that he did not think that the Act was intended to protect from liability a married woman who enters into a contract apparently as principal, though she may be actually an agent for an undisclosed principal, and that she should not escape liability on the plea that she was in fact an agent, though she did not mention any facts from which that inference could be drawn.

In the case before me, however, the circumstances which gave rise to those dissenting judgments do not exist, for the plaintiff hospital's evidence is that Mrs. Mann, on entering the hospital, placed on record her husband's name. On the foregoing authorities, therefore, it is clear that Mrs. Mann contracted

for the hospital's services as agent for her husband, Samuel Mann, that she never did have personal liability for the hospital account and that her husband, Samuel Mann, was solely liable for it.

*Paquin, Limited v. Beauclerk, supra*, also makes it clear that the fact that the wife makes payments on account does not change her status as agent for her husband. Consequently, in the case before me, if Mrs. Mann made some or all the payments on account, she would still be agent for her husband. If he made the payments, it would only accentuate his liability as principal. If some third party made the payments, it would not alter Mrs. Mann's status as agent.

Furthermore, there is no joint liability of husband and wife unless the evidence clearly establishes it. In *Morel Brothers & Co., Limited v. Earl of Westmoreland, supra*, a vendor of provisions to the Countess of Westmoreland sued both the Earl and the Countess for the price and signed judgment against the Countess, who did not defend. The judgment being fruitless, they proceeded against the Earl. The provisions were supplied while the spouses were living together and at two periods, one being before the Earl set aside an allowance for his wife for household expenses and the other period being after that time. The jury found that the Earl was liable for the necessities supplied before the creation of the allowance and that thereafter the Countess acted for herself and as agent for the Earl jointly and that the plaintiffs gave credit to the Earl in the name of the Countess.

The trial judge accordingly gave judgment against the Earl for the goods supplied both before and after the allowance. The Court of Appeal reversed him on the ground that, as to goods supplied after the creation of the allowance, the presumption that the wife had implied authority to pledge her husband's credit was rebutted by evidence of the allowance and that, as to goods supplied both before and after the arrangement, there was no evidence of a joint liability on the husband and wife, so that the signing of judgment against the wife was a bar to recovery from the husband.

The House of Lords affirmed the Court of Appeal. The Earl of Halsbury L.C. said: " . . . the plaintiffs might have sued either the agent or the principal. . . . The result was that



the plaintiffs got judgment against the agent. They cannot get judgment against the principal also. It is an alternative remedy; it cannot be made available against the two." Lord Shand concurred. Lord Davey did also and added that if the evidence established joint liability the plaintiffs could not be prejudiced by signing judgment against one or the other, but, if the evidence showed not a joint debt but an alternative claim against one or the other, the signing of judgment against one of the joint debtors was an election to take their remedy against that one, so that they could not proceed against the other. Lord Robertson said there was no evidence of joint liability; the period before creation of the allowance was bare of any evidence which could yield the legal inference of joint liability and thereafter the creation of the fund took the place of the lady's authority, express or implied, to pledge his credit at all, joint or several.

That case was followed in *Moore v. Flanagan et ux.*, [1920] 1 K.B. 919, in which case a vendor sued husband and wife for the price of goods supplied to the wife and it was held that the signing of judgment against the wife was a bar to recovery from the husband who defended.

Finally, the fact that the wife has an income of her own, or adequate separate means, does not rebut the presumption that she has authority to pledge her husband's credit for necessities: *Davidson v. Wood* (1863), 32 L.J. Ch. 400; *Seymour v. Kingscote* (1922), 38 T.L.R. 586; *Callot et al. v. Nash* (1923), 39 T.L.R. 291.

The contract of the wife does not bind the husband if the tradesman gives credit, not to the husband at all, but to the wife exclusively, knowing that she is a married woman: *Callot et al. v. Nash, supra*.

Counsel for the plaintiff cites two cases as authority for the proposition that a wife is liable for her own hospital and medical expenses, namely, *Re Asma*, [1950] O.W.N. 291, and *In re Estate of Mailman*, 15 M.P.R. 169, [1940] 2 D.L.R. 71, affirmed without discussion of this point, [1941] S.C.R. 368, [1941] 3 D.L.R. 449. They do not really apply to the case before me, however, as they deal with the right of a personal representative to pay bills out of a deceased wife's estate and it was held that, since he had paid them in the ordinary course of administration, he should be allowed for them. In the last-mentioned

case, though the majority of the Nova Scotia Court of Appeal allowed the disbursement on the above ground, the other two judges disagreed in part, holding that there was no right to allow payment out of the wife's estate of her medical and hospital expenses on the ground that she was not liable for them.

Counsel for the plaintiff also cites *Biberfeld v. Berens*, [1952] 2 Q.B. 770, [1952] 2 All E.R. 237, as indicating that a wife who is turned out of the home by her husband is in the same position as a wife who cohabits with her husband and that she is not an agent of necessity to pledge her husband's credit for necessities if she has separate means of her own. It is true that, in some respects, the position of the wife as to necessities is similar but it is not identical, as the cases show. In regard to maintenance after separation, a number of facts are to be considered, including the wife's personal income and her ability to work. All that that case lays down is that, in considering whether a wife who has been compelled by her husband's conduct to leave him is his agent of necessity, regard must be had to her means of support and that, as the wife in the case had assets of considerable value, consisting of savings certificates, a bank balance, a dividend and jewellery, which she could reasonably be expected to use for necessities, she was, accordingly, not her husband's agent of necessity. At p. 784, however, Denning L.J. said: "I can see that in many cases a wife could not reasonably be expected to realize her capital assets. For instance, if she had only the house in which she lived with her children, she could not be expected to sell it; or if all she had was an insurance policy, she could not be expected to surrender it. It all depends on what could reasonably be expected of her." Hodson L.J. agreed with that view.

In the case before me, if a wife cohabiting with her husband were in the same position as the separated wife in that case, the unreasonableness of expecting a wife to sell her home to obtain necessities is accentuated when the fact is that she had only an undivided one-half interest in the home to sell, necessitating an order for sale under The Partition Act. There is no evidence whatever that she had any assets other than that half-interest.

Whatever may be said of the position of a separated wife, however, it cannot be argued tenably, since the decision of the

House of Lords in *Paquin, Limited v. Beauclerk, supra*, either that a wife cohabiting with her husband is liable for necessities if the common law presumption that she is his agent for necessities is not rebutted or that The Married Women's Property Act altered that position.

In the case before me, there is no evidence that the plaintiff gave credit to the wife alone, knowing that she was a married woman. On the contrary, the plaintiff sued the husband. There is no evidence whereby Mr. Mann rebutted the presumption of fact that his wife had authority to pledge his credit for the hospital account; indeed, on the contrary, he suffered default judgment to be signed against him for the account. There is no evidence whatsoever of their joint liability for the account. It seems clear under the authorities that Mrs. Mann was never liable for the account and that her husband was solely liable for it. Yet both were sued for it and default judgment for it was signed against them both. There is nothing that I can do in this case to rectify that position because there is no application to that end before me. The principles discussed above, however, do affect the question as to whether the conveyance by the wife of her undivided half-interest in the property at issue can be set aside properly.

It is elementary law that a joint tenancy is distinguished by the four unities of interest, title, time and possession and each joint tenant is seized *per my et per tout*, each having an undivided interest in the whole property, none being seized of a particular part. Consequently Samuel Mann and Eva B. Mann were each seized of an undivided half of the property. It seems clear, under the authorities cited and having regard to the operation of Rule 354, that I must set aside the conveyance at issue as to the undivided half-interest of Samuel Mann.

The undivided half-interest of Eva B. Mann, however, stands on a different footing. At the time she executed the conveyance in question and even at the time it was registered, it is clear, under the authorities cited, that she was not personally liable to the plaintiff hospital for its account and, consequently, the plaintiff was not her creditor. Therefore, she could not have executed the conveyance of her undivided half-interest in the property with the intent to defeat or delay her creditors. Though it is unnecessary for a plaintiff in an action to set aside a con-



veyance as a fraud on creditors to prove that he has reduced his claim to judgment, he must nevertheless prove that he has in fact a valid claim against the transferor and it will not be assumed that he has such a claim merely because he has asserted it by bringing another action which is still pending: *Bell v. Williamson and Moulton*, [1945] O.R. 844, [1946] 1 D.L.R. 372. Consequently, the issue by the plaintiff of its writ against Samuel and Eva B. Mann on 31st October 1951 did not establish that the plaintiff was a creditor of Eva B. Mann and the signing of default judgment against them both on 17th December 1951 could not relate back so as to establish the plaintiff as a creditor of Eva B. Mann before the delivery and registration of her conveyance by 14th November 1951. Therefore, in my opinion, the conveyance by Eva B. Mann of her undivided half-interest in the property cannot be set aside so as to deprive the infant defendants of their share of that undivided half-interest. For the same reasons, I do not think that the conveyance can be set aside so as to deprive their mother, the adult defendant May Mann, of her share of that half-interest, nor do I think that Rule 354 operates against her to deprive her of such share. It would be a patent absurdity to hold that the infant grantees do not lose their shares in the half-interest because Eva B. Mann was not a debtor of the plaintiff but that May Mann must lose her share of the half-interest in spite of the fact that Eva B. Mann was not a debtor. That absurdity, moreover, can be avoided without doing violence to Rule 354. That Rule only operates as an admission by May Mann of statements of fact in the plaintiff's statement of claim. There is no statement in the statement of claim that Eva B. Mann was a debtor of the plaintiff at the time of the conveyance, so there is no admission by May Mann that she was. Paragraph 8 of the statement of claim alleges that the conveyance was voluntary and void as against the plaintiff, and it was void in so far as it dealt with the interest of Samuel Mann, and if that is a statement of fact, May Mann is deemed under the Rule to admit it, but the statement is probably one of law rather than one of fact. Paragraph 9 alleges that the intent of the conveyance was fraudulent and that it was made with intent to defeat, hinder, delay or defraud the plaintiff, and so it was with respect to the half-interest of Samuel Mann, and May Mann is deemed under the Rule to admit it. Paragraph 10

alleges that since the conveyance Samuel and Eva B. Mann have continued to occupy the premises with the grantees, but it is the lawful privilege of the grantees to permit them to do so. In my opinion, therefore, there is no conflict between the operation of Rule 354 and the retention by May Mann of her share of Eva B. Mann's undivided half-interest.

There will, therefore, be judgment declaring the said conveyance null and void as against the plaintiff in respect of the undivided half-interest of the grantor Samuel Mann in the lands therein described and setting the conveyance aside in respect of the half-interest, but dismissing the action as against the defendant May Mann and the infant defendants, Eva Mann and Irene Mann, in respect of the undivided half-interest of the grantor Eva B. Mann, the result being that the defendant Samuel Mann is a tenant in common of an undivided one-half interest in the lands conveyed and the said defendants, May Mann, Eva Mann and Irene Mann are each a tenant in common of an undivided one-sixth interest in the said lands. As the plaintiff had to go to Court for the relief obtained, it should have its full costs as taxed. As the Official Guardian had to protect the interest of the infants, he should have his full costs, payable by the plaintiff, as agreed upon or taxed, which may be added to the plaintiff's costs pursuant to Rule 655 to the extent that realization of the half share of Samuel Mann permits. There will be fifteen days' stay of execution.

*Judgment accordingly.*

*Solicitors for the plaintiff: MacKay, McAvoy, Craig & McKerroll, Owen Sound.*

*Guardian ad litem of the infant defendants: Percy D. Wilson, Official Guardian, Toronto.*

[ANGER J.]

**Dale Estate Limited v. The Town of Brampton.**

*Taxation — Municipal Business Assessment — Rate of Assessment — Nature of Business Carried on by Taxpayer — Wholesale Florist — Whether a "market garden" or "nursery" — The Assessment Act, R.S.O. 1950, c. 24, s. 6(1)(m), (3), (9).*

There is no authority for limiting the expression "market garden", as used in s. 6(9) of The Assessment Act, to a garden of which the produce is sold on a "market" in the restricted meaning of that word. The intent of subs. 9 is clearly to exempt from business assessment all primary producers, and it cannot have been the intention of the Legislature that such a producer should be exempt if he sold his produce on a "market", but liable to assessment if he sold through stores, which is the way in which the needs of the great majority of the consuming public are supplied.

A "nursery", properly so called, does not cease to be a nursery merely because all or part of it is under glass.

The plaintiff company carried on a business, fully described in the reasons for judgment, partly within and partly outside the limits of the defendant municipality. The Town contended that the plaintiff's preponderating business, within the meaning of subs. 3 of s. 6 of The Assessment Act, was that of a "wholesale florist", and that it was therefore assessable under subs. 1(m). The plaintiff claimed to be exempt under subs. 9, on the ground that it operated a "farm, market garden or nursery".

*Held*, the plaintiff's business should be regarded as within subs. 9, and it was consequently wholly exempt from business assessment. *The City of London v. Wright Flowers Limited*, [1952] O.R. 457, distinguished; other authorities reviewed.

AN ACTION for a declaration that the defendant's assessments of the plaintiff for business tax were invalid.

27th and 28th April 1953. The action was tried by ANGER J. without a jury at Brampton.

*H. E. Manning, Q.C.*, and *J. R. Rumball, Q.C.*, for the plaintiff.  
*Stuart Thom* and *W. E. West*, for the defendant.

11th June 1953. ANGER J.:—In this action, by virtue of amendments to the pleadings made at the trial upon the joint application of counsel, the issue is whether eight assessments made in 1952 for business assessment for 1953 in respect of certain lands of the plaintiff are valid, such assessments being made under s. 6 of The Assessment Act, R.S.O. 1950, c. 24.

Business assessment is dealt with in s. 6 of the Act and the issue turns upon the effect to be given to subss. 1(m), 3 and 9 thereof, which provided at the time of the assessment as follows:

"6.—(1) Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of, or in connection with, any business mentioned or described in



this section shall be assessed for a sum to be called 'business assessment' to be computed by reference to the assessed value of the land so occupied or used by him, as follows: . . .

"(m) Every person carrying on . . . any business not specially mentioned before in this section, for a sum equal to twenty-five per cent. of the assessed value. . . .

"(3) Subject to subsections 4 and 5, no person shall be assessed in respect of the same premises under more than one of the clauses of subsection 1, and where any person carries on more than one of the kinds of business mentioned in that subsection on the same premises, he shall be assessed by reference to the assessed value of the whole of the premises under that one of those clauses in which is included the kind of business which is the chief or preponderating business of those so carried on by him in or upon such premises. . . .

"(9) No person occupying or using land as a rooming house, farm, market garden or nursery shall be liable to business assessment in respect of such land."

To put the issue in a nutshell, the defendant contends that, since over 80 per cent. of the plaintiff's revenue results from the sale of cut flowers and florists' supplies, its chief or preponderating business is that of "wholesale florist", so as to be a "business not specially mentioned before" within the meaning of clause *m* of subs. 1, and that, therefore, under that subsection and under subs. 3, the plaintiff is properly assessed for business assessment for such business in a sum equal to 25 per cent. of the assessed value of all land used in such business, notwithstanding subs. 9; whereas the plaintiff's contention is that it uses the whole of its land, other than some built upon and rented, as a farm, market garden or nursery, so as to be exempt from business assessment under subs. 9.

The defendant places reliance upon the decision in *The City of London v. Wright Flowers Limited*, [1952] O.R. 457, and contends that under that decision the issue is *res judicata*, but in my opinion that is not so. That case is distinguishable from the case before me in the following respects: First, the learned judge of the County Court in that case, after considering the operations of the defendant and reviewing some of the authorities as to what constituted a market garden or nursery, found on the evidence that the business of the defendant was that of a

wholesale florist and not that of either a market garden or a nursery; in the Court of Appeal Robertson C.J.O., delivering the judgment of the Court, said at p. 470: "While some of [the] cases may seem to lend some support to the appellant's contention, I think we must bear in mind that the learned judge was dealing with a question of fact, and while there may be differences of opinion, as illustrated in the cases cited to the learned County Judge, as to what set of circumstances constitutes a market garden or nursery, the learned County Judge reached his conclusion on a consideration of the facts before him. In my opinion we cannot say that he was wrong in his conclusion". Therefore, that being a finding of fact, the decision is not binding upon me. Second, the learned County Court Judge in that case was confronted by the fact that the corporate powers of the defendant in its letters patent were "(a) To carry on the business of wholesale and retail flower, fruit, vegetable and nursery stock *merchants*, brokers, importers, exporters, producers, distributors, commission agents and general agents; and (b) To import, export, produce, buy, sell, manufacture and deal in all kinds of china and glassware, crockery and utensils, ornaments, bric-a-brac, notions, novelties and fancy articles and specialties of every kind", whereas in the case before me the plaintiff's corporate powers are quite different, and I shall refer to them later. Third, although the report does not so indicate, the appeal records do indicate that the defendant in that case did not operate a farm in connection with its business, whereas, in the case before me, the plaintiff does so operate a farm, a factor of prime importance, as I shall show. Fourth, the assessments in that case covered only the greenhouses and the land on which they stood, and did not cover land not built upon, whereas in the case before me the assessments go much beyond that, include much open land and even include the private gardens of employees of the plaintiff. Fifth, what I regard as the crucial points of law were apparently not raised in that case, and at least were not dealt with in either the judgment of the learned County Judge or that of the Court of Appeal. Consequently, I cannot properly follow that case but must deal with the case before me on its own facts and the law that appears to be applicable thereto.

I will deal first with the plaintiff's corporate powers. It was incorporated on 31st January 1920, the powers in its letters

patent—a copy of which was filed as ex. 4—being (a) to carry on the business of florists in all its branches; to plant, cultivate, raise and sell flowers, bulbs, roots and plants and to carry on gardening of every kind and to buy, sell and deal in flowers, plants and seeds of every description, and (b) for the purposes aforesaid, to acquire and take over as a going concern the business then carried on at the town of Brampton by the executor of the estate of the late Henry Dale, under the style of Dale Estate, and all or any of the assets and liabilities of that business.

Counsel for the defendant contends that the plaintiff thus gives, as its first and presumably chief purpose or object, the business of a florist, having a dictionary definition of “one who cultivates flowers; one skilled in the knowledge of flowering plants; also, one who deals in flowers”. I do not think, however, that anything turns on the order in which activities are named. Also, I do not think that the fact that a person may be a florist, as so defined, is the governing factor, for every person who sells flowers or flowering plants raised on his farm or in his market garden or nursery is bound to fall within such dictionary definition, but, at the same time, he remains none the less a farmer, market gardener or nurseryman.

In my opinion, the important points to consider, in so far as the letters patent are concerned, are that the plaintiff was empowered to raise flowers, bulbs, roots and plants and to carry on gardening of every kind and to take over the business of the Dale Estate which at and prior to the time of incorporation in 1920, was called “Dale Nurseries”, as shown by the correspondence filed as exs. 8 and 9, and the evidence of the plaintiff’s witness William A. Beatty.

The uncontroverted evidence of the plaintiff’s witnesses John Beatty, assistant to the managing-director of the plaintiff, and an employee of the plaintiff for 13 years, and of William A. Beatty, superintendent of shipping and assistant sales-manager of the plaintiff, and an employee of the plaintiff and its predecessors since 1902, except between 1908 and 1914, established the following facts:

The plaintiff owns 150 acres within the limits of Brampton and 100 acres lying beyond the town limits (and also a further 100 acres in another locality, which land does not enter into this case). On the land lying beyond the town limits, and on



about 90 acres of the land in the town, the plaintiff conducts farming operations, raising thereon grain crops, pasture and field crops for the feeding of cattle which are fattened for sale and sold (cattle sales amounting in 1952 to about \$25,000), and crops of clover, timothy and alfalfa to be used as pasture and then to be ploughed under in order to enrich the soil. The cattle are kept for the sake of the manure to fertilize the soil, their barns being outside the town limits. The barnyard manure is the main fertilizer but, since it is deficient in phosphates, chemical fertilizer is also used. Of the 150 acres within the town some 80 acres have been assessed for business assessment, comprising about 25 acres covered by greenhouses, about 25 acres of open garden land, another area covered by large cloth-houses (cheese-cloth on wooden frames for the growing of flowers in the summer and early fall), another area comprising employees' private kitchen-gardens, and the areas covered by the heating-plant which is necessary to heat the greenhouses, and by the main office building in which the plaintiff conducts its business, grading and shipping, and which also contains a cold-storage or cooling-area for flowers and greens. In the greenhouses are grown orchids, gardenias, carnations, violets, snapdragons, bulbs such as iris, stocks, chrysanthemums and flowering bushes or shrubs, such as roses, hydrangeas and azaleas, and plants for potting, such as cyclomen, ferns, cedars and huckleberry bushes, tomatoes and some vegetables, such as asparagus, lettuce, cucumbers and potatoes. In regard to flowers and flowering plants, bulbs, shrubs or bushes, the great bulk of the sales is of cut flowers, other plants, bulbs, shrubs or bushes being nurtured either under glass or in open areas for transplanting in other persons' gardens, or for propagation or decoration in their homes, potted plants and bulbs also being sold for this purpose. The vegetables are for public table food and are grown under glass when the market is advantageous. The cutting of flowers is done throughout the winter and spring. The plants or bushes from which the flowers are cut are replanted or sold.

In regard to sales, the evidence established that the greatest percentage of the plaintiff's buyers consists of retailers—retail florists or flower-dealers, grocery-stores, department-stores and chain-stores; it conducts a mail-order business, has several salesmen, has a limited sale on commission, and sells some of its

products, including rose-bushes, to other growers; it also sells at retail to local residents. In 1952, 59 per cent. of the plaintiff's sales consisted of cut flowers, principally "autographed roses", so called because one leaf of each stalk is perforated with the name "Dale" to indicate the high quality of the plaintiff's roses. The plaintiff also sells wreaths and sprays in areas in which there are no retail florists, the orders being taken by local agents. The plaintiff also buys and resells cut flowers produced by others when necessary to fill an order. It also sells, through its several salesmen, florists' supplies, such as baskets, wirework and accessories and some garden tools and equipment. I shall refer to these side-lines later.

The same evidence established the integration of use of the plaintiff's land with respect to soil-treatment and growth-rotation. It was established that the farming operations are essential to gardening. The intensive use of the soil in the greenhouses and garden areas to produce the products I have mentioned depletes the growth-producing qualities of the soil. For example, unless the soil used to produce roses is replenished with fibrous matter the roses deteriorate. Also, the soil remains in the plaintiff's greenhouses for a year or several years and is then sterilized by steam to kill the harmful soil diseases and parasites. The same soil is used to grow the products that the plaintiff sells, whether vegetables or flowering plants or bushes, there being no difference in cultivation in that respect. Soil sterilized by steam must be taken away for several years before it can be used again. For these reasons, it is taken to areas of the plaintiff's farm and sowed with fibrous crops—grass, clover, timothy and alfalfa—which are first used as pasture and then are ploughed under to replenish the soil with fibrous matter. Some land is left lying fallow. The soil so removed from greenhouses and garden areas is thus left outside for eight or ten years. It is replaced by the soil taken from the farm areas which has been so replenished and fertilized by manure of the cattle. Although the plaintiff also buys some soil which has been sown in grass for years, the reason for buying the farm-land was to get soil. Two or three thousand loads of soil are thus moved for the plaintiff's purposes. The superintendent is a graduate of Ontario Agricultural College, a soil-expert and analyst, and he and his staff test the soil in the greenhouses every 6 or 8 weeks.

Furthermore, changes are made each year in the items grown in the greenhouses and open garden areas, for rotation is important.

The evidence establishes that the plaintiff operates a heating plant, oil-fired, to produce the heat required for its products, some nine miles of piping running to all greenhouses except cold-frames, and it also has an auxiliary plant. Roadways connect all greenhouses for ingress and egress.

In all its operations, the evidence shows that the plaintiff employs different classes of employees according to the nature of their duties.

It is thus seen that the plaintiff uses all of its land as a highly-organized, thoroughly-integrated unit, a factor which is of importance when considering the law applicable to this issue, to which I shall refer later.

Under s. 6(9) of The Assessment Act, no person occupying or using land as a farm, market garden or nursery is liable to business assessment in respect of such land. None of these expressions is defined in the Act. From the evidence I have indicated, it is clear that the plaintiff operates a farm and thus occupies or uses its land as a farm and I so find as a fact. The question remains whether that part of the farm which, glassed over or otherwise, is used to produce the vegetables, fruits, greens and flowering plants, shrubs and bushes is separable from the rest of the farm for the purposes of s. 6(9) and, if so, whether that part constitutes a market garden or nursery.

The question as to what constitutes a market garden is a vexed one. Dealing with dictionary definitions first, it is to be observed that the Shorter Oxford Dictionary and Murray's New English Dictionary agree in giving, as the first meaning of "market", "The meeting together of people for the purchase and sale of provisions or livestock, publicly exposed, at a fixed time and place", adding under a paragraph covering phrases more or less metaphorical "to bring to market" means "offer for sale"; they agree under the seventh meaning that "the market" means "the particular trade or traffic in the commodity specified in the context"; they agree, when later defining special combinations, that a "market garden" is "a piece of land on which vegetables are grown for the market".



Now, dictionaries are written by scholars and it seems to me curious that the scholars, in thus dealing in one place with "market", should say that a market garden is a piece of land on which vegetables are grown for "the market" instead of "a market" in plain English if they thought that, to constitute a market garden, the produce had to be sold on a market in the sense of an assemblage of persons meeting at an appointed time and place. That they did not say so is, to my mind, of some significance.

Similarly, the Century Dictionary and Imperial Dictionary define market garden as a garden in which vegetables and fruits are raised for "the market". A large urban centre, the existence of which gives rise to market gardens, usually has a number of markets in the restricted sense of an assemblage of persons meeting at an appointed time and place. Hence, the words "the market" appear to me to be singularly inappropriate if such a restricted market is meant. A person who contends that a market gardener is only one who sells his produce at "a market" in the restricted sense has, therefore, little if any support from the well-known, current dictionaries.

Furthermore, turning to legal precedents, I have been unable, after an exhaustive search of the authorities, to find a single decision which states or clearly implies that, to constitute a market garden, the produce must be sold at a market in the restricted sense of an assemblage of persons meeting at an appointed time and place. The question what circumstances constitute a market garden has come up repeatedly in England in the interpretation of statutes and the question has been determined, not from the manner in which the produce was sold, but from the manner in which the land was cultivated and, to a lesser extent, the nature of its produce. None of the statutes defines "market garden" except The Agricultural Holdings Act, 1923, which defines it as a holding which is cultivated wholly or mainly for the purpose of the trade or business of market gardening, but it does not define market gardening—which shows the caution of the legislature in attempting to limit the words.

As to the nature of the produce, it is well to state at this point that it is well settled that a market garden includes not only the growth of vegetables and fruits: *Purser v. The Local Board of Health for the District of Worthing* (1887), 18 Q.B.D.

818; *Mears v. Callender*, [1901] 2 Ch. 388, including tree-fruits, such as peaches: *Mears v. Callender*, *supra*, and plums: *Lowther v. Clifford*, [1927] 1 K.B. 130, but also the growth of bulbs: *Monro and Cobley v. Bailey* (1933), 102 L.J.K.B. 471, and flowers: *Purser v. The Local Board of Health for the District of Worthing*, *supra*; *Lowther v. Clifford*, *supra*. It is true that in some of the cases such as *Lowther v. Clifford*, the market gardener did in fact sell his products on a market in the restricted sense, such as Covent Garden Market, but nowhere could I find it laid down that he is not a market gardener unless he does so.

In Great Britain, there came up for interpretation a subsection of s. 211 of The Public Health Act, 1875, providing that all woodlands, market gardens or nursery grounds should be assessed at only one-quarter of their annual value. In *Kay v. Finchley Local Board* (1885), 49 J.P. 488, an appeal came before certain justices of the county constituting the Middlesex Quarter Sessions for the purpose of interpreting that subsection. The appellant owned about 2½ acres of ground, 2 acres of which were covered with glass-houses used for the purpose of forcing fruits and flowers for "the early markets". It was admitted that the appellant annually sold thousands of pounds of grapes besides flowers, from which he made profits equal to the profits made on fruits. Evidence in support of the appellant's case was given by horticultural auctioneers who stated that in their opinion the glass-houses were nurseries and that the appellant's ground could be described only as a market garden or nursery ground. The Bench allowed the appeal, being of the opinion that the appellant's property was within the exemptions mentioned in the subsection, no mention being made of the method of sale.

That same subsection came up for consideration in *Purser v. The Local Board of Health for the District of Worthing*, *supra*. On a stated case, the agreed facts were that the appellant was a grower of fruit, vegetables and flowers at Worthing and described himself and was commonly known as a market gardener and nurseryman; on his land 16 glass-houses or greenhouses of various sizes were erected; the houses were used by him for the purpose of growing tomatoes, cucumbers and grapes, and, to a smaller extent, other vegetables, for the purpose of sale; the plants and crops grown therein were watered and heated by artificial means and grown upon soil placed upon prepared beds

inside the houses and matured much earlier than in the open ground; the roots of the vines were in prepared beds outside the houses and the stems were carried through apertures to the inside, 8 of the greenhouses being used for growing vines; all the houses were built upon dwarf brick walls like ordinary greenhouses and the whole of the land, with the exception of an inconsiderable portion, was covered with the houses.

Day J. at pp. 820-1 said: "I cannot entertain a doubt that this ground is within the exemption created by the Act, and that it ought to be assessed at one-fourth of its net annual value; it is used for gardening, that is, for the production of fruit and vegetables on a more or less small scale, as distinguished from agricultural use on a large scale; and in my judgment it is a market garden. It is very difficult to define the distinction in these cases; but this ground is clearly used, not as a farm, but for the growing of those products for which market gardens and nursery grounds are ordinarily used. It is said that it is not a market garden because the bulk of it is under glass; but I fail to see the distinction; in my opinion a garden is not the less a garden because it is effectually protected by glass against the weather or by high walls against the wind; and this particular ground is used as a garden for trade purposes and not merely, like a gentleman's garden, for pleasure. It is a garden whether it contains one greenhouse or twelve."

Wills J. at p. 821 said: "I am of the same opinion. In arriving at our decision we should look at the state of things which was in existence when the Act was passed. There were then market gardens and nursery grounds all over the country, and in the majority of them a very large and substantial portion was covered by glasshouses. Gardening operations were carried on in them, and the cultivation of hothouse and greenhouse plants is no less essential a part of these operations than the cultivation of plants which grow in the open air. These are places where operations in the nature of gardening are carried on, and these houses are parts, and necessarily so, of them. I think that such pieces of ground are very properly included under the head of market gardens or nursery grounds. Modern life has increased the relative proportion in them of glass to ground uncovered; but I see no reason why the ground so occupied should not fall within the exemption."



On appeal, Lord Esher M.R. at p. 822 said: "I am of opinion that the judgment of the Queen's Bench Division must be affirmed upon the grounds stated by the learned judges. There can be no doubt that the respondent used the whole of this plot of land as a market garden—for the purpose of growing fruits and vegetables for sale. I think that the land is not the less used as a market garden because these glass houses have been placed upon it."

Fry and Lopes L.JJ. agreed.

Note again that, in determining whether land was a market garden, no reference was made to the method of sale. Note also that, in both of those cases, market garden and nursery ground were treated as synonymous terms.

Also in Great Britain there came up before the House of Lords for interpretation the provision of The Income Tax Act, 1918, providing that profits arising from lands occupied as "nurseries or gardens for the sale of produce" were to be assessed under rule 8 of schedule B, but other lands were to be assessed for tax in the ordinary way by reference to assessable value.

In *Monro and Cobley v. Bailey*, *supra*, the appellants carried on a business which they described as "Spalding Bulb Farms". Bulb-growing exhausts land and therefore bulbs were grown and ordinary crops were cultivated on portions of the land in rotation. There were 204 acres on 4 farms and, for the year in question, the sale of cut blooms realized £8,332, that of bulbs £5,415, that of general farm crops £1,623, and the labour charges were far in excess of those for ordinary farm labour. The Commissioners of Income Tax assessed the whole 204 acres for income tax under rule 8 of schedule B, as being lands occupied as gardens for the sale of produce. The appellants claimed their land was not occupied as a nursery or garden for the sale of produce and that the acres of farm land did not constitute a garden and should be assessed under the general rules. The Court of Appeal and the House of Lords confirmed the decision of the Commissioners.

Lord Buckmaster, at pp. 473-4, said: "The appellants have a holding of about 204 acres in Lincolnshire, sixty acres of which are annually devoted to the growth of bulbs, which bulbs are obviously intended to be used when sold for the purpose of producing flowers, and not for the purpose of consumption. They

use sixty acres for that purpose alone, because it is necessary, for change of soil and other reasons, that they should use no more. The Commissioners have, however, found that the main purpose for which the whole of the 204 acres are used is the growth of bulbs. The flowers which these bulbs produce are sold to a substantial extent, but none the less it is stated that they are never cut at times when their cutting would do injury to the bulbs themselves, and that the real purpose of the business is the cultivation and the growth of bulbs. The methods of agriculture which are described are those which are in common use for the ordinary purposes of husbandry. The land is worked by ploughs, horses, tractors and other agricultural implements. None the less, upon the facts the Commissioners have held that this land is occupied as a garden for the sale of the produce of these bulbs. The question, and the only question, before this House is whether it is possible to say that there was not material upon which that conclusion could be reached. . . . It is plain that in all such cases the distinction is a matter of degree; no general principle can be made to govern them, and I agree with the judgment of Romer, L.J., which I think has put the whole matter in a nutshell; he said (148 L.T. at p. 53): "The question whether the land in the occupation of the appellants was or was not occupied by them as a garden seems to me to be a question of fact for the Commissioners to decide, and I am not prepared to hold that there was no evidence upon which the Commissioners might properly answer that question as they did, in the affirmative."

Lords Tomlin, Russell of Killowen and Wright agreed.

Since the statute under consideration did not refer to "market garden" but to "garden for the sale of produce", the importance of that decision to the case before me lies in the fact that the revenue from cut flowers was over 54 per cent. of the total, the revenue from the bulbs was over 35 per cent. and the revenue from general produce was only about 11 per cent., yet the grower remained a gardener.

That same provision again came before the House of Lords in *Bomford v. Osborne*, [1942] A.C. 14, [1941] 2 All E.R. 426. In that case, the Commissioners of Income Tax had held that 229 acres of a mixed farm of 536 acres should be separately assessed as gardens under rule 8 of schedule B, and that the rest

of the holding should be assessed in the ordinary way by reference to assessable value. The parts regarded as gardens were interspersed throughout the farm. The High Court struck out of the 229 acres some 26 acres as not being ancillary to the garden. The Court of Appeal sustained the commissioners and the House of Lords reversed the Court of Appeal.

Viscount Simon L.C., at p. 17, said that in 1806, when the Act first originated: " . . . it may be presumed that the distinction between gardens and farm land was easily made. 'Gardens for the sale of the produce' were market gardens, usually situated near large towns, cultivated for the most part by spade, rake, and hoe, and growing characteristically garden crops. . . . The qualification 'for the sale of the produce' is manifestly inserted so as to exclude from the rule gardens where produce is grown for the supply of an adjoining house, belonging to the same occupier, or gardens where the profit is made by charging the public for admission."

He went on to say:

"But a great change has come over the face of the country since 1806 in this respect, with the result that the distinction between garden and farm is not now so easy to draw. In consequence of a greater variety of produce grown on farms, a better knowledge of the principles governing rotation of crops, and a revolution in transport as the result of which Covent Garden and similar markets can be supplied in bulk from a great distance with vegetables and fruit, much of the produce which was at one time confined to gardens may now be part of the output of a farm. The cultivation in open fields with a view to sale of what in earlier days would be regarded as a characteristically garden product cannot in itself justify the conclusion, that such fields have become 'gardens'. Etymologically, the word appears to imply that the ground is enclosed, and in common understanding a method and intensity of cultivation especially suitable to an area set apart for horticulture is part of the general conception.

"The present appeal, however, can be decided without adventuring upon the difficult task of precise definition. I am quite prepared to accept the view that a defined area may be a 'garden' for the purpose of r. 8, even though it is not fenced round, as long as it is a distinct and separate unity devoted to



gardening. . . . The main test, in my opinion, is that the defined area should be subject to that nature and intensity of treatment which is characteristic of horticulture."

He, therefore, disagreed with the view of the commissioners that the arable land was ancillary to the market garden operations and said that the acreage devoted to wheat and production of straw for litter and production of feed for livestock were ancillary to that part of the farm admitted not to be garden at all.

Viscount Maugham also disagreed with the commissioners. After pointing out that most farms produce most of what is ordinarily produced in gardens and that there must be special facts to justify splitting into two areas a single mixed farm worked as a unit, he said at p. 33 that he agreed with Scott L.J. in the Court of Appeal "that the distinction between 'farm' and 'gardens' may be expressed in general words as the difference between lands cultivated by agricultural methods and lands on which horticultural methods are employed. Produce which requires the attention of skilled men would generally be found grown in a garden", and he went on to say that hand labour would usually be employed in a garden and that it would be very unusual, as in that case, that the land be for the most part machine-planted and machine-hoed. At p. 34, he said that the occupier of a farm as a single unit must *prima facie* be entitled to be taxed as a unit. At p. 35, he added:

"My Lords, I do not wish to be understood as saying that a farmer cannot carry on ordinary farming and at the same time carry on the business of 'gardens for the sale of the produce' on a distinct area adjacent to or situate within his holding so that, as regards the latter, he would be taxable under r. 8. I do, however, express the opinion that it is wholly erroneous to select from the area of a farm occupied and worked in one unit, which is used for raising crops and small fruits predominantly, of kinds grown by farmers all over the country, the land being cultivated by ordinary agricultural methods and by ordinary agricultural labourers working indiscriminately on the whole farm and to give to the selected portion the name of 'gardens for the sale of the produce'."

Lord Russell of Killowen concurred in that judgment.

Lord Wright, at p. 38, said that there were two main questions of law, namely, what was the meaning of "gardens for the sale

of the produce" and how that meaning was to be applied to an acreage worked as a single mixed farm in one unit. He said that the distinction between garden and farm was not merely that the land is used for the sale of produce, that is, to make profits, and that, to distinguish gardening operations from other agricultural operations to raise produce from the land, there must be some other criterion. He referred to the history of methods of cultivation tending to increased use of agricultural methods, even on lands occupied as gardens, to obtain increased production. He said at p. 40:

"I, therefore, do not think that the use of such methods as contrasted with horticultural methods in the stricter sense can serve as the general criterion to distinguish gardening within r. 8 from farming, although that factor may be taken into account in considering whether particular lands are garden lands as contrasted with farm lands. The nature of the produce raised is no doubt also an important factor, but there again the line cannot be drawn with precision."

He went on to say that particular produce was that of both a garden and a farm and that modern methods and demands had in many cases led to specialized production on a large scale. He said, at pp. 40-1:

"The word 'gardens' is not used in r. 8 in a technical sense. It is an ordinary word, to be understood as in ordinary popular usage. But whatever else may be included in the word 'gardens' in the rule, I think that it cannot be wholly divorced from its root idea of a substantially homogeneous area, substantially devoted to the growth of fruits, flowers and vegetables. The dictionary definitions of 'garden' include the idea of its being an enclosed space. . . . I do not say that in modern times gardening operations falling within r. 8 may not be carried on in open fields. But the essential characteristic of the statutory 'garden' and the idea material to this case is that it should be within reasonable limits a defined unit of cultivation in relation to space. That is not inconsistent with the inclusion in the unit of some lands used at some particular time for other purposes. This is necessary for rotation of crops. But it must be possible to predicate a substantial and relatively permanent unity of character and purpose."

He allowed the appeal because, in the case, there was no defined unit of occupation as a garden but only scattered fields. So did Lord Porter who, at pp. 46-7, said:

"If I were asked to state the most material matters to be looked at in determining whether a particular portion of land was occupied as a garden or no, I should lay stress on (a) the unit to be considered, i.e., was the whole land worked by the same methods and the same staff or was there some clear distinction in its treatment; (b) the method of cultivation, i.e. was it intensive and under skilled labour or not; (c) what crops were grown there; and, I think (although its importance is slight), (d) the size of the unit. That the cultivation was effected by mechanical means would not, I think, provided it were proved to be intensive, make it impossible to hold that the land was occupied as 'gardens'. Methods of cultivation change and what at one time can only be accomplished by the spade may at another be brought about by some mechanical substitute, but, even so, the large-scale operations of a farm are still likely to be distinguishable from the more individual cultivation of a garden crop.

"Some continuity of treatment is also, I think, predicated."

I have cited this case at some length to show, first, what a garden is; second, that etymological meanings and conceptions of earlier times undergo change with the passage of time and must give way to modern methods and demands; third, that statutory references are to be construed according to popular usage; and fourth, that the operator of a farm worked as a unit is entitled *prima facie* not to have separate parts separately assessed. It is also very interesting to note that the Attorney-General, arguing on behalf of the Crown that the commissioners were right in treating the disputed land as gardens, contended that, in deciding whether land is to be treated as a market garden or not, the test is whether as a whole it is cultivated predominantly for the growth of vegetables which eventually are sold to greengrocers and by them to customers in their shops.

The same provision again came up for consideration in *Roberts v. Barter* (1944), 60 T.L.R. 560. In that case, the respondent was the occupier of 8 watercress-beds and no other land. The watercress-beds were necessarily specially prepared and supplied with water and specially harvested and sent to



“the market”. The Commissioners of Income Tax held that the cress-beds did not come within the classification of nurseries or gardens for the sale of produce, so as to be assessable under rule 8 of schedule B of The Income Tax Act, and that the land was assessable under the ordinary rules. On appeal to the King’s Bench Division, Macnaghten J. reversed the commissioners. He referred to the rules laid down in *Bomford v. Osborne*, *supra*, namely, (1) that a garden used for the sale of produce must be a defined area of land, so that there cannot be a shifting use in the case of a “market garden”; (2) it must be defined and cultivated as a “market garden” from year to year and cannot be a garden one year and an ordinary farm the next; (3) the method of cultivation must be intensive, and he thought that, though no precise definition of intensive cultivation may be possible, the methods used in the case indicated intensive cultivation; (4) the nature of the produce is a characteristic but is not so helpful as those just mentioned because the produce of a “market garden” may be such as is cultivated on an ordinary farm, but he thought it could not be said that watercress was an ordinary farm crop; (5) the size of the holding is not a very helpful feature because there are large as well as small “market gardens”, and he referred to *Monro and Cobley v. Bailey*, *supra*. He said that, though no one would think of calling watercress-beds a “garden”, nevertheless, if the watercress-beds exhibited the characteristic features of a “market garden”, the case came within the meaning of rule 8. He said, at p. 561:

“The General Commissioners held that the beds in this case were not a ‘garden,’ but it may be that they misapprehended the meaning of that word as used in rule 8, and in view of the facts as found by them I think that they must have misapprehended that meaning. According to the description which they have given of the place and of the way in which it is cultivated, I think their decision that it does not come within the classification of a nursery or garden within the meaning of rule 8 is erroneous in law, that they ought, on the facts as found by them, to have come to the conclusion that it was a market garden within rule 8. . . .”

Clearly Macnaghten J. regarded the words “garden for the sale of the produce” as equivalent to “market garden”, and thought that it was the method of cultivation that distinguished a market garden, not where the produce was sold.

He did the same thing in *Roberts v. Williamson* (1944), 60 T.L.R. at 561. In that case the respondent, besides occupying 14 watercress-beds, occupied 1,000 acres of farm land, the labour employed was used indifferently for the cultivation of the watercress-beds and the rest of the farm and the whole formed a single unit. Macnaghten J., after referring to *Bomford v. Osborne* as showing that a case might arise in which for the purposes of assessment the separation of the whole farm into two parts would be proper, said at p. 562: "It seems to me that, if ever there could be a case in which it was proper to split the farm into that part which is used for the purposes of husbandry and that part which is used as a market garden, this is one." He thus referred to "market garden" although the report makes no reference to where the watercress was sold.

The conception that a market garden is distinguished by its nature rather than by the method in which its produce is sold was carried to the point that land was held to be a market garden, although none of its produce was sold at all.

In *De Poix et al. v. Chapman*, [1947] 2 All E.R. 649, the appellants occupied a farm of a little over 108 acres, about 86 acres being admittedly farm land, about 19 acres being woodland and less than 2 acres being a kitchen garden in which the work was done by a gardener not employed on the rest of the land, its fruits and vegetables being produced for the occupants, their families and friends, none of it being sold, any surplus being given to a hospital. The Finance Act, 1940, provides in s. 10 that farming is to be treated as a trade for the purpose of income tax and defines "farm land" as being land wholly or mainly occupied for the purpose of husbandry, "not being market garden land", and that "farming" is to be construed accordingly. Section 11 provides that if the total annual value of the farm land does not exceed £100 it must be assessed in accordance with The Income Tax Act, 1918, schedule B. The commissioners found that neither the woodland nor the garden was occupied for the purpose of husbandry but held that they were bound to treat the whole 108 acres as being "mainly occupied for the purpose of husbandry" since more than half was used as farm land. The annual value of the farm land alone was less than £100 but the annual value of the whole exceeded that figure. The taxpayers appealed to the King's Bench Division, claiming the benefit

of s. 11. Atkinson J. held that the taxpayers were right and were entitled to severance of the land. He referred to *Bomford v. Osborne, supra*, quoting the different judgments in the House of Lords. He said at p. 653:

"It seems to me that those opinions establish that in a proper case a holding can be divided into two or more portions and ought to be so divided if different rules are applicable for assessment to tax, but there must be definite separation of the portions in respect of which a separate assessment is claimed and a certain permanence of purpose and use to which they are put. . . . It is plain that no part of the woodlands nor of the garden was occupied for the purpose of husbandry. . . . The garden was not even touching any part of the rest of the farm. It is shown as a green patch on the map quite distinct from the farm and the woodlands had such clearly defined boundaries that there has been no difficulty in getting absolutely accurate measurements. The appeal succeeds, and the Case will have to go back to the commissioners for them to fix the proper assessments."

Now it is to be observed that, in regard to the garden land, the words of the statute are "not being market garden land" and such a decision would have been quite impossible if, in order that land may be a market garden, its produce must be sold on a market in the sense of an assemblage of persons meeting at an appointed time and place.

In *Lowther v. Clifford, supra*, the question was as to the terms of an overholding of a tenant, one point being whether the land was a market garden under The Agricultural Holdings Act, 1923. Lord Hanworth M.R. disagreed with McCardie J. of the Court below and said that the land in his judgment was a market garden as it was cultivated wholly or mainly in order that all crops upon it might be sold in the course of trade or business in the Covent Garden Market and the crops included fruit and some of those specified in the schedule of the Act, rhubarb particularly forming a large part of the plants grown.

Scrutton L.J., with reference to a point that there must be arbitration under the Act, said at p. 140: "To deal with this point, it is first necessary that the land, the subject of the tenancy, should be a 'holding' within the Act of 1923. It will be such a holding if it is 'in whole or in part cultivated as a market garden.' The judge below has found it is not such a holding, as it is really a 'plum orchard'. I am unable to take this view.



The produce of the trees and the crops of vegetables grown under them are sent regularly to Covent Garden Market for sale and the land seems used substantially for no other purpose. The use of the land is to grow fruit, vegetables and flowers for market; it seems to be essentially a market garden."

Sargent L.J. also disagreed with McCardie J.

The only other case known to me that bears on the point of what is a market garden is the older case of *Ex parte Hammond; In re Hammond* (1844), 14 L.J. Bcy. 14. In that case, a person was adjudged bankrupt and appealed to have the adjudication annulled. The legislation provided that no farmer should be deemed a trader liable by virtue of the Act to become bankrupt, but all market gardeners should be deemed traders and liable as such to become bankrupt. The evidence showed that the bankrupt, in accordance with the custom of farmers in that part of the country, sowed part of the land with peas and potatoes as clearing-crops, preparatory to turnips or wheat, in lieu of fallowing, and sent the peas and potatoes to salesmen in London, allowing them the same commission in respect of sales as they were allowed by other market gardeners. The evidence also showed that the bankrupt used the plough and not the spade and that he employed only common husbandry labourers and not a particular class of labourers. Sir J. L. Knight Bruce said that to give an exact definition of market gardener within the Act might be difficult and he would not undertake it. He said it might be easy to say who was not a market gardener within the meaning of the Act and that he was satisfied on the evidence that the person in question was a farmer and not, within the just and reasonable construction of the Act, a market gardener, so he annulled the bankruptcy. It is to be observed, therefore, that the case turned on the method of cultivation and not the method of sale, despite the argument of counsel for the assignee that the test of a market gardener was the sending of the produce regularly to market.

It so happened that, in *Lowther v. Clifford, supra*, the produce was sent to the Covent Garden Market. In all of the other cases I have cited, however, not a single judge stated that, in order that a piece of land be a market garden, its produce must be sent to such a market. If it is a *sine qua non* that a garden cannot be a market garden unless its produce is sent to a market in the restricted sense of an assemblage of persons meeting at an ap-

pointed time and place, it seems to me very remarkable that not a single judge has made that simple statement of law. If that were a *sine qua non*, it seems to me that the judges or some of them could not have failed to enunciate it. The fact that it was not enunciated seems to me to be very significant. It seems to me that, whatever may be the original etymological meaning of "market garden", it is no longer regarded, in the country in which the expression originated, as being a garden the produce of which must be sent to market in the restricted sense I have mentioned.

The substance of a sage statement by Oliver Wendell Holmes is that a word is not set and crystal-clear, but is the clothing of a thought which varies in hue and content according to the time and circumstances in which it is used. The truth of that statement is demonstrated in *Bomford v. Osborne*, *supra*, and the other cases I have cited, showing that the etymological meaning of "garden" has been departed from, as has the earlier conception that a garden could not be such unless it was worked by hand-tools, both conceptions having been broadened out in the passage of time in harmony with modern conditions and demands. I think, therefore, that in England a market gardener includes one who sends his produce to retail stores for resale to the consuming public as was argued by the Attorney-General in the House of Lords in *Bomford v. Osborne*.

Then, too, the intent of our Assessment Act must be considered. It is a fundamental rule of construction of statutes that ambiguous words should be so construed as to give effect to the apparent spirit and intent of a statute. For example, see *The Grand Trunk Railway Company of Canada v. The Hepworth Silica Pressed Brick Company* (1915), 51 S.C.R. 81 at 85, 21 D.L.R. 480, 19 C.R.C. 365; *McBratney v. McBratney*, 59 S.C.R. 550 at 551, 50 D.L.R. 132, [1919] 3 W.W.R. 1000; *The King v. Dominion Cartridge Co.*, [1923] Ex. C.R. 93 at 98; *Gordon Mackay & Co. Ltd. v. J. A. Larocque Co. Ltd.*, 59 O.L.R. 293 at 314, [1926] 3 D.L.R. 864, 7 C.B.R. 384, reversed in part, *sub nom. Gordon Mackay & Company, Limited et al. v. Capital Trust Corporation Limited*, [1927] S.C.R. 374, [1927] 2 D.L.R. 1150, 8 C.B.R. 216; *Astor v. Perry*; *Duncan et al. v. Adamson*, [1935] A.C. 398 at 417.

Section 6(9) exempts from business assessment land used as a farm, market garden or nursery. To me, it seems clear that the intent is to exempt primary producers, which intent seems to be made even clearer by the amendment made by 1953, c. 6, s. 3(2) (to come into force on 1st January 1954), by virtue of which the subsection will read:

“(9) No person occupying or using land as a rooming house, farm, market garden, nursery or for the keeping of bees for the production of honey shall be liable to business assessment in respect of such land.”

Now it is common knowledge that only a small fraction of the consuming public can obtain their supplies of fruits, vegetables and flowers at markets in the restricted sense and that the great bulk of supplies needed by the consuming public must be purchased at stores handling them. Is it to be supposed that the Legislature intended that market gardeners who supply a fraction of the consuming public's needs by means of sale on markets in the restricted sense shall be exempt from business assessment, but market gardeners who supply the greatest part of the consuming public through stores shall be subject to business assessment, even though the gardens be of the same size, be in the same locality, be worked in the same way and produce the same things? I decidedly think not. I think that the Legislature intended a market garden to include one the produce of which is sold to the consuming public by any means. On the basis of my being right in my conclusion of law that a market garden includes one the produce of which is sold otherwise than on a market in the restricted sense I have mentioned, then I find as a fact that the plaintiff uses its land as a market gardener.

The next question is what is meant by “nursery”. As to dictionary meanings, the Shorter Oxford Dictionary gives as one of the meanings of nursery: “A piece of ground in which young plants or trees are reared until fit for transplantation; a collection of such plants. Now usually a nursery-garden”. Murray's New English Dictionary gives as one of the meanings: “A plot or piece of ground in which young plants or trees are reared until fit for transplantation; a collection of such plants. Now usually a piece of ground of considerable extent in which plants or trees are reared for sale.” The Century Dictionary



describes "nursery" as: "A place where trees are raised from seed or otherwise in order to be transplanted; a place where vegetables, flowering plants and trees are raised (as by budding or grafting) with a view to sale". Funk and Wagnalls' New Standard Dictionary of the English Language describes nursery as: "A place where trees, shrubs, flowering plants, etc., are raised for sale or transplanting".

As was held in *Purser v. The Local Board of Health for the District of Worthing*, *supra*, a market garden remains such although it is covered by glass. The same thing is true of a nursery: *Penton v. Robart* (1801), 2 East 88, 102 E.R. 302; *Porter v. Drew et al.* (1880), 5 C.P.D. 143; *Gough v. Wood & Co.*, [1894] 1 Q.B. 713; *Smith et al. v. Richmond*, [1898] 1 Q.B. 683, per Lindley M.R. at pp. 701, 703; *Mears v. Callender*, *supra*, per Cozens-Hardy J. at p. 396. As Lindley M.R. said in *Smith et al. v. Richmond*, *supra*: "To urge that market gardens and nursery ground do not cease to be so because they are more or less covered with glass-houses is to urge what is quite true."

As the plaintiff's witness John Beatty said, all outdoor operations are complementary to the whole business. As its witness William A. Beatty said, the plaintiff got as employees old growers and gardeners from England where the business was called "nurseries" and he named a number of businesses in or near Brampton called nurseries, the business of which is the same as that of the plaintiff. Its witness Cecil I. Delworth, called as an expert by reason of being in a similar business and holding high office in a number of related associations, confirmed that the lands of growers of fruit, flowers and vegetables were called nurseries in Great Britain, that modern British texts so describe them and that there is no distinction in the methods and problems in regard to growth of all such produce. Mr. Delworth said that the title of nurseryman, as commonly used, has been appropriated by persons who grow shrubs and "ornamentals", including small trees, and that there is a distinction between these persons and growers of cut flowers but that there is an overlapping. Since the produce of a nursery and a market garden may be the same to a considerable extent and greenhouses are used for both purposes, the terms have been treated as virtually synonymous in some cases. For example, land was described as a nursery or market garden in *Kay v. Finchley Local Board*, *supra*, and in

*Purser v. The Local Board of Health for the District of Worthing*, *supra*. It is the vernacular and not the scientific or etymological meaning that prevails: *Borys v. Canadian Pacific Railway Co. et al.*, [1953] A.C. 217, [1953] 1 All E.R. 451 at 454-5, [1952] 2 D.L.R. 65, 7 W.W.R. (N.S.) 546; the meaning in ordinary popular usage and not the technical meaning: *Bomford v. Osborne*, *supra*, at pp. 40-1.

It is not necessary that I should name the products of the plaintiff which can properly be called those of a nursery. It is sufficient that some of them be so. In my opinion, the raising of orchids, gardenias, carnations, roses, azaleas and hydrangeas in a hothouse is nursery work, as is the raising of cedars and ferns, and probably a number of other flowering and non-flowering plants fall into that category. The plaintiff raises them for transplantation or sale and obviously satisfies the dictionary meaning of nursery and the meaning ascribed by the trade. Consequently, I find as a fact that the plaintiff uses its land as a nursery.

Counsel for the defendant cited to me *Bradshaw v. Minister of Customs and Excise*, [1928] S.C.R. 54, [1928] 2 D.L.R. 352, in which case Duff J., as he then was, held that cut flowers and potted plants were not "nursery stock", so as to be exempt from sales tax under The Special War Revenue Act. In my opinion, however, that case has no bearing on the case before me. To say that cut flowers and potted plants do not remain nursery *stock* is quite different from saying that their raising is not nursery *work*.

Thus, in my opinion, the plaintiff occupies and uses the whole of its land as a farm, market garden or nursery, so as to be exempt from business assessment in respect of such land under s. 6(9) of the Act.

Now the disposition of this case does not depend upon my being right in my conclusions of law as to what constitutes a market garden or nursery. It is obvious that all products of the soil produced for sale, as distinguished from those that grow wild, can be purchased only on a farm, including its garden, or in a garden that is not part of a farm, or in a nursery. To the extent that products of the soil produced by the plaintiff cannot be properly said to be those of a market garden or of a nursery, it follows inexorably that they are at least the products of the

garden area of the plaintiff's farm. No one could deny tenably that a farm's garden is just as much a part of the farm as any other part, or that glassed-over land remains a garden, so that, in any event, the whole of the plaintiff's land is exempt from business assessment under s. 6(9) of the Act.

Counsel for the defendant brought out on cross-examination the fact that the plaintiff, in classified advertisements and otherwise, describes itself as "wholesale florists" and that the plaintiff is a member of a wholesale florists' association but not of a nurserymen's association, and contends from these facts that the plaintiff has established itself as a wholesale florist. Evidence on behalf of the plaintiff also shows that the plaintiff's sign reads "Dale Estate Ltd., Home of the Autographed Rose". Now I think that it is wholly immaterial which association the plaintiff chooses to belong to or how it advertises or describes itself in order to get business, the only material point being whether it occupies or uses its land as a farm, market garden or nursery. That was settled by the House of Lords in *Monro and Cogley v. Bailey*, *supra*, in which case the appellants called themselves "Spalding Bulb Farms" but were held to remain gardeners just the same.

Now a farmer, market gardener or nurseryman who raises and sells flowers and flowering plants cannot avoid being automatically a "florist" from the mere fact of such sale, and if he raises and sells fruits he cannot avoid being a "fruit dealer" because he so sells, and if he raises and sells seeds he cannot avoid being a "seed dealer", but he remains none the less a farmer, market gardener or nurseryman. To say that, by reason of such sales, he ceases to be a farmer, market gardener or nurseryman is not only illogical but devoid of legal authority. It is just as unjustifiable to say that a farmer, market gardener or nurseryman who sells cut flowers, retaining the bushes, shrubs, bulbs or plants for future propagation, loses his status and becomes a florist as it would be to say that, if he sells picked fruits, retaining the trees, bushes or plants for future propagation, he loses his status and becomes a fruit dealer, for I can see no distinction in principle between cut flowers and picked fruits. Not only is it devoid of legal authority to say that by reason of such sales he loses his status but it is actually contrary to established authority so to say and it is immaterial in that regard what proportion of



his total business such sales represent. Those points also were settled by the House of Lords in *Monro and Cobley v. Bailey*, *supra*, in which case 54 per cent. of the appellants' business consisted of sales of cut flowers and 35 per cent. consisted of sales of bulbs, a total of 89 per cent. of the business, yet the appellants were held to be gardeners for the sale of produce.

The defendant Town nevertheless claims the statutory right to assess the plaintiff as a florist and that involves what I have mentioned as being the crucial point of law. The defendant relies upon the proposition that, since the chief or preponderating business of the plaintiff lies in the sale of cut flowers, flowering plants and florists' supplies, it may, under subs. 1(m) and subs. 3 of s. 6 of the Act, assess the plaintiff for business assessment as a florist for a sum equal to 25 per cent. of the assessed value of the whole of the plaintiff's lands used in such business. It is obvious that such action is in disregard of the exempting subs. 9 and that it cannot be validly done unless subss. 1 and 3 override subs. 9. Now subs. 9 is explicit and absolutely unqualified. It prohibits business assessment in respect of any land occupied or used as a farm, market garden or nursery. That subsection could not be qualified by any other subsection unless that other subsection contained some such words as "notwithstanding subsection 9". It is a fundamental rule of construction of statutes that there is no right to eliminate words or insert limiting words unless the grammatical and ordinary sense of the words as enacted leads to some absurdity or some repugnance or inconsistency with the rest of the enactment, and in those cases it may be done only to the extent of avoiding that absurdity, repugnance and inconsistency: *Grand Trunk Pacific Railway Company et al. v. Dearborn*, 58 S.C.R. 315 at 320-1, 47 D.L.R. 27, [1919] 1 W.W.R. 1005; and see *Walsh v. Trebilcock* (1894), 23 S.C.R. 695, and *In re Canadian Northern Railway Company* (1909), 42 S.C.R. 443 at 466.

There is no repugnance or inconsistency involved in subs. 9. It is a clear-cut exemption, such as is repeatedly found in statutes. To give effect to the defendant's assessments would involve inserting in subs. 1 or subs. 3 the words "notwithstanding subsection 9" or, alternatively, inserting in subs. 9 the words "subject to subsections 1 and 3" or some proviso respecting another business or preponderance of business. Any such insertion would

be contrary to the rule of construction just enunciated and would amount to an amendment which a Court may not make and which can be made by the legislature alone.

Lord Macmillan said in *Astor v. Perry; Duncan et al. v. Adamson, supra*, at p. 417: "So far as the intention of an enactment may be gathered from its own terms it is permissible to have regard to that intention in interpreting it, and if more than one interpretation is possible that interpretation should be adopted which is most consonant with and is best calculated to give effect to the intention of the enactment as so ascertained. More especially, where two sections forming part of a single statutory code are found, when read literally, to conflict, a Court of construction may properly so read their terms as, if possible, to effect their reconciliation."

I think that the intent of subs. 9 to exempt from business assessment the business of a farm, market garden or nursery is very plain and, to give effect to that intent under the above rule of construction, the words "any business not specially mentioned before in this section", contained in clause *m* of subs. 1, must be construed as being subject to the exemptions of subs. 9.

The consequence of the foregoing rules of law is that, even if somehow the plaintiff could be regarded as a florist, as distinct from a farmer, market gardener or nurseryman, the plaintiff could not be assessed for business assessment as a florist in respect of the lands which it occupies or uses as a farm, market garden or nursery. It follows that the same thing is true of the other side-lines of the plaintiff. I regard the plaintiff's purchase and sale of the produce of others to fill an order as ancillary or incidental to its main business but, if it is to be regarded as a separate business, the plaintiff's lands are not subject to assessment for such side-business, by reason of the unqualified language of subs. 9. Similarly, I regard the plaintiff's importation of bulbs and sale of some of them as ancillary or incidental to its main business but, if it is to be regarded as a separate business, the plaintiff's lands cannot be assessed in respect of it. So too, I think that the plaintiff's making and selling of baskets and wire articles for display purposes as florists and the selling of garden tools is ancillary or incidental to its main purpose and that its lands cannot be assessed in respect of it. Could a farm be assessed for business assessment if the farmer chose to make and

sell bird-houses and cedar garden furniture, as many of them do? I think that a judge would be loath to hold that it could. It is also to be observed that none of the plaintiff's side-lines, nor all of the side-lines put together, constitute the chief or preponderating business of the plaintiff, being only a minor part thereof.

The unqualified language of the exempting subs. 9 is accentuated by the language of subs. 9a, added by 1952, c. 3, s. 3(2). While it lasted (for it was repealed and replaced in 1953 by a subsection with a different policy), it provided as follows:

"(9a) No corporation entitled to an exemption under paragraph 19 of section 4 and occupying or using land *solely* for the purpose of a co-operative cold storage plant shall be liable to business assessment in respect of such land."

The word "solely" which I have italicized is significant, because it does not appear in subs. 9. The Legislature alone, by amendment in terms of policy, can distinguish between products of the soil and the preponderance thereof and make subject to business assessment an activity carried on upon lands used as a farm, market garden or nursery.

The eight business assessments at issue, filed as ex. 1, cover eight parcels of the plaintiff's land and bear the parcel designations W26-10, W27-7, W27-8, W26-8, N23-14, N24-16, N23-13 and N23-15, which correspond with similar parcel designations in the real property assessments filed as ex. 2, showing the acreage involved, and also correspond with those designations shown on the plan filed as ex. 10, showing the location of such parcels.

A final thought in respect of such assessments is that such parcels include only that part of the plaintiff's land which is garden land and related buildings and they do not include that part which is recognized as farm land, and that brings up the point mentioned in the House of Lords in *Bomford v. Osborne*, *supra*, that a person working a single mixed farm as a unit is entitled *prima facie* to have it assessed as a unit and that there must be special facts to justify splitting it into two areas. Since The Income Tax Act under discussion in that case provided that farm land was to be assessed on one basis and garden land on another basis, it was pointed out that there could be cases in which it would be proper to separate the farm into two discernible parts and so in cases which followed that case—*Roberts v.*



*Williamson, supra*, and *De Poix et al. v. Chapman, supra*—the separation was made. Now that separation was due only to the fact that the whole farm had to be assessed for tax on some basis. The situation in the case before me is quite different. Here land used as a farm is not liable to business assessment at all. It is clear that the plaintiff runs the whole farm as a single, integrated unit, as evidenced by the soil-interchange and growth-rotation, which was the reason why in *Monro and Cobley v. Bailey, supra*, the entire 204 acres were assessed as garden land because they were needed to maintain 60 acres thereof as bulb land. Yet in the case before me the defendant Town, knowing that the whole farm cannot be assessed, seeks to single out for separate assessment parcels of garden land, including the green-houses and buildings necessary to operate the garden and nursery. I do not think that that can be done in the case of a farm and nursery worked as a unit. It would be different if, to use an illustration given by counsel for the defendant, part of the land were operated as a junk-yard. If anything further were needed to indicate the invalidity of the eight assessments, I think it would be supplied by this attempted breaking-up of a single unit.

For all of the reasons I have stated, all of the eight business assessments are, in my opinion, invalid as being contrary to s. 6(9) of The Assessment Act. Furthermore, the assessment of parcel N26-14 includes the gardens and glasshouses privately used by employees of the plaintiff and therefore not used for business at all, so that that assessment, by reason of this invalid inclusion, is invalid on that additional ground: see *Montreal Light, Heat & Power Consolidated v. The City of Westmount*, [1926] S.C.R. 515, [1926] 3 D.L.R. 466.

There will therefore be judgment against the defendant, with costs, declaring that all business assessments in respect of the plaintiff's lands in the town of Brampton at issue and all entries in the rolls in respect thereof are null and void and restraining the defendant, its officers, servants and agents from collecting or enforcing payment of any sum based upon any such assessment or entry. There will be 15 days' stay of execution.

*Judgment for plaintiff.*

*Solicitors for the plaintiff: Kilmer, Rumball, Gordon & Beatty, Toronto.*

*Solicitor for the defendant: W. E. West, Brampton.*

[FERGUSON J.]

**Ginter v. Ginter.**

*Divorce and Matrimonial Causes — Alimony — Successive Actions for Same Relief — Effect of Dismissal of Action for Alimony and Custody — Whether Sufficient Change in Circumstances Shown in Second Action — Conduct of Wife as Bar to Relief — Matters actually Decided in First Action.*

A judgment in an action for alimony and custody, although it is not final for all time, in the sense that it can never be opened up, does finally determine the rights of the parties as of its date. *Menary v. Menary*, [1942] O.W.N. 417, applied. Although a wife may bring a second action for alimony if there is sufficient change in circumstance to entitle her to relief, she cannot question the findings made in the first action, or have the matters disposed of in it re-litigated in the second action. If the first action was dismissed in part because the wife's conduct disentitled her to relief (this being a proper ground for dismissing such an action: *H. v. H.*, [1944] O.R. 438), the findings as to that conduct cannot be questioned in the second action.

A wife's willingness to return to her husband after leaving him, if it is to entitle her to a judgment for alimony, must be a genuine desire for a real restitution of conjugal rights, coupled with a corresponding willingness to render them to her husband: *H. v. H.*, *supra*, at p. 453.

*Judgments and Orders — Principle of res judicata — Matters Brought into Question in First Action — Consideration of Pleadings and Reasons for Judgment.*

The binding effect of a judgment between the same parties extends to every point that properly arose in the litigation, and the parties are estopped in subsequent proceedings from questioning the findings on any point on which the Court was called on to form an opinion, or might have been so called on if the parties had shown reasonable diligence. No right, question or fact directly put in issue can be re-litigated. *McIntosh v. Parent* (1924), 55 O.L.R. 552, applied. In determining what was in issue and what was decided in the first proceedings the Court is entitled to look not only at the record but also at the reasons for judgment. *Re Ontario Sugar Co.; McKinnon's Case* (1910), 22 O.L.R. 621; 24 O.L.R. 332; *Kemptville Milling Co. v. Village of Kemptville* (1924), 26 O.W.N. 431, applied.

*Infants — Custody — Jurisdiction of Courts — Infant Out of Ontario.*

Although it was held in *Re Harding* (1929), 63 O.L.R. 518, that the Court had jurisdiction to grant custody even though the infant in question was out of Ontario, doubt has been cast upon this jurisdiction in *Cleaver v. Cleaver*, [1949] O.W.N. 640.

AN ACTION for alimony and custody of infant children.

15th May 1953. The action was tried by FERGUSON J. without a jury at Toronto.

*Lewis Duncan, Q.C.*, for the plaintiff.

*T. Delany, Q.C.*, for the defendant.

12th June 1953. FERGUSON J.:—This is an action for alimony and custody of the three children of the marriage.

The parties were married in Toronto on 6th November 1943, the wife then being 19 years of age and the husband 24. The

wife had been raised as a city girl in Toronto, and the husband, who had been recently discharged from the Canadian army, was raised on a farm in Manitoba. The children of the marriage are all boys, being now 8, 7 and 5 years of age respectively. The parties lived at various addresses in Toronto after marriage; and the husband, never remaining at any job for any length of time, decided that he was more interested in something connected with farming than he was with city life and, in consequence, purchased a small chicken-farm at Lakeview, a suburb of Cooks-ville, Ontario. This property was purchased in the spring of 1946, and they moved there in April of that year with about 300 chickens, which the wife says the husband kept in one of the bedrooms for a period of six weeks.

The relations of husband and wife were not particularly harmonious, and in July of that year she left him and his two little children for a period of about three weeks. She was forgiven by her husband and he permitted her to return to the household in August 1946. After that date the relations between the husband and wife, although not perfectly harmonious, were never such as to degenerate into a violent quarrel or an open breach. However, on 21st January 1952 they quarrelled violently. I need not go into the details of the quarrel for reasons which will later appear. Suffice it to say that the wife alleges that she was attacked by her husband who choked her into something approaching insensibility. She left the house that night, and returned the next morning and informed her husband that she had laid a charge of assault against him and had asked the children's aid society to come and take charge of the children. This pronouncement spurred the husband into intense activity. He promptly put the children in his truck and took them to his sister's in Toronto. He managed to get in touch with a woman whose name he did not know and whose residence he was unable to state, and engage her to take the three children to his mother's home on the farm in Manitoba. He proceeded so energetically that he was able to put the mysterious woman and the three children on the train bound for the west less than forty-eight hours after the children were removed from his home in Lakeview.

The wife, who was unaware of the whereabouts of the children, consulted a solicitor and brought an action against her



husband on the 26th February. In that action she asked for alimony and custody of the three infant children. That action came on for trial before Kelly J. at Brampton, on the 1st and 2nd May 1952. He delivered judgment on the 2nd July 1952, dismissing the wife's claims both for alimony and for custody, and he made an order depriving the wife of access to the children. At the date of the trial the children were in Manitoba. In his reasons for judgment Mr. Justice Kelly found that the wife stated at the trial before him that she was not willing to return to her husband under any circumstances and the defendant at that time intimated that he was willing to take his wife back.

After the first trial the plaintiff changed her solicitor and the present action was commenced by writ issued on the 19th September 1952. It is also a claim for alimony and custody, with an added claim to have the defendant ordered to return the children to Ontario in order that the plaintiff may have access to them, an order for the return of some furniture and for the payment of medical, surgical, nursing and hospital care, the latter two of which were not pressed at the trial.

The trial before Mr. Justice Kelly was scarcely over when the plaintiff wife realized that she had made a mistake in declaring that she was not willing to return to her husband under any circumstances. The evidence is controversial as to what she did prior to 2nd July 1952. She states, however, that as early as 5th May she endeavoured to see her husband to inform him that she wanted to go back and live with him. She states that she left a note at the house but this was ignored. She also phoned his sister. She tried to hail him as he drove past in his truck. He repulsed all her advances, but finally said that if she would remove a *lis pendens* which she had filed against the property in which they had lived, he would talk business. It is admitted, however, that she did take a number of steps after the date of Mr. Justice Kelly's judgment. She went to her husband's place of employment about the 10th or 11th July, when he refused to speak to her. She moved back into the family residence about 12th July, when the husband promptly laid a charge of trespass against her, and she was convicted and fined before the magistrate at Cooksville on 19th August. At this time there was an action pending between husband and wife

with respect to the title to the family residence against which the wife had filed the *lis pendens* referred to. On 27th August the *lis pendens* was vacated by order of Judson J., and on the following day the wife wrote a letter to the husband in which she said:

"I have carefully thought about Judge Kelly's suggestion that I return & I am prepared to go back & endeavor with you to make our marriage a success.

"We will both start new & forgive & forget everything in the past.

"I certainly hope you will come to some agreement soon so we can be with the children as I know they would be very happy to see us.

"Hoping to hear from you soon.

"Yours sincerely,  
"Evelyn."

That letter was ignored, as was a further letter, sent by registered mail on 4th September, in which she stated:

"I am willing to forgive you for what you did to me but in the future you will have to learn to treat me like a wife should be treated, not something you can knock around when ever you get upset."

The wife then issued a writ, through her new solicitor, on 19th September 1952.

I was concerned throughout this trial to prevent the parties re-litigating that which had been tried before Kelly J., but, notwithstanding this, a great deal of evidence got in, under the guise of explaining the change in circumstances, which was really a review of the evidence heard by Mr. Justice Kelly. The plaintiff's counsel put his case on the basis that the judgment of Kelly J. is no bar, because the wife now genuinely desires to return to her husband and to render unto him the *consortium vitae* which, as a husband, he is entitled to receive. Counsel argues that the change in her wishes makes the whole matter at large and that I ought to reconsider the evidence heard by Kelly J. and that, in determining whether or not there is a change in circumstance, the Court ought to hear all over again all the evidence heard at the first trial.

A judgment in an action for alimony and custody, although not final for all time, in the sense that it can never be opened

up, nevertheless does finally determine the rights of the parties as of its date: *Menary v. Menary*, [1942] O.W.N. 417, [1942] 3 D.L.R. 746. Every point which properly belonged to the subject of the litigation between the parties when they were before Kelly J. is *res judicata*, and the plaintiff is estopped from questioning the Court's findings on every point on which the Court was called upon to form an opinion. This is so not only as regards the points actually brought forward but also as regards the points which the parties might with reasonable diligence have brought forward. Any right, question or fact directly put in issue cannot be re-litigated: *McIntosh v. Parent*, 55 O.L.R. 552, [1924] 4 D.L.R. 420; and see 6 C.E.D. (Ont.), 2nd ed. 1952, p. 581. In determining what was in issue and what was decided, the Court has a right to look at the record and at the reasons for judgment as well: *Re Ontario Sugar Co.; MacKinnon's Case* (1910), 22 O.L.R. 621, affirmed 24 O.L.R. 332; see also *Kemptville Milling Co. v. Village of Kemptville* (1924), 26 O.W.N. 431.

Kelly J. found that the wife had disentitled herself to alimony. In his reasons for judgment he stated: "Dealing firstly with the plaintiff's claim for alimony, she bases her claim on the defendant's cruelty and alleges that she suffered great pain and anguish because of his conduct and that she was in a highly nervous condition. On the evidence I find that the plaintiff has not established her allegations of cruelty on the part of the defendant. I am of the opinion that if the defendant used any violence toward the plaintiff, he was provoked to do so by the plaintiff who has a very vile tongue and who also was in the habit of using force and violence toward the defendant. I find that the defendant's conduct did not amount to legal cruelty nor did the plaintiff suffer by reason of the defendant's conduct nor was she afraid of the defendant. I may say that I was more impressed by the evidence of the defendant and his witnesses than I was by the evidence of the plaintiff and her witnesses. The evidence established that the defendant is industrious and hardworking. In addition to doing his work on his regular shifts at the Canadian National Railways, he also worked in his garden and acquired and tended from 1,000 to 2,000 chickens. The defendant also gathered and helped to clean the eggs and both he and the plaintiff sold them to neighbours. I also find that the plaintiff



was not happy in carrying out her duties as a housewife and preferred working away from home and taking part in pleasures and enjoyment which took her away from her home and children. According to the evidence, she had left the defendant at least once before and had asked the defendant to take her back, which he did. Accordingly, I am of the opinion that the plaintiff's claim for alimony and maintenance for herself must fail."

As regards the claim for custody of the children, he found as follows: "On the plaintiff's claim for custody of the children I am also of the opinion that that claim must fail. According to the evidence of the neighbours, the plaintiff has a violent temper and she is in the habit of using very vile and profane language even in front of the children. She herself admitted that she called the children 'bloody polacks, God-damn polacks and buggers'. Several neighbours gave evidence of having heard the plaintiff calling the children by the aforesaid names and such further names as 'bastards and sons of bitches'. The neighbours gave evidence of having heard the plaintiff 'hollering' at the children and ill-treating and unduly abusing them when they displeased her and some of them stated that the children sought shelter in their homes to get away from the range of her voice and of her tantrums. The neighbours also gave evidence that the defendant was quiet and treated the children kindly and that they witnessed the children running to meet their father when he came home from work and that they followed him around the garden and when he was attending to the chickens. I entertain no doubts on the evidence that the welfare of the children demands that they remain in the custody of their father, and I so find."

However, it is argued that these findings do not impute cruelty on the part of the wife, and that in the absence of a finding of cruelty against the wife, the husband had no defence to his wife's action. The action tried before Kelly J. was, I think, one against her husband based on allegations of cruelty, (There are no allegations of adultery either way.) Her action was dismissed. She did not allege desertion against her husband, but he on his side did specifically allege desertion against her as a defence. It is argued that it was not open to Kelly J. to dismiss the plaintiff's action on any ground but desertion as there was no issue raised by the defendant in the first action

but desertion. I am, however, satisfied on a perusal of the proceedings in the first action that the wife's conduct was raised. At any rate, Kelly J. not only found that she was guilty of desertion but also dismissed her action because of her conduct, and it is obvious that much evidence relating to her conduct was admitted and dealt with.

It is argued that this action falls under the third part of The Judicature Act, 1895, c. 12, s. 30, which gives a right to alimony to a wife "whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights". It is argued that, since cruelty was not in precise words found against the wife, and adultery is not in issue, it is open to her to change her mind in respect of returning to her husband and, if she genuinely desires to return, he has no defence to her claim. But in his judgment in *H. v. H.*, [1944] O.R. 438, [1944] 4 D.L.R. 173 (*sub nom. Hawn v. Hawn*), after considering the history of the law of alimony and many of the cases, Laidlaw J.A. concluded that not only were adultery and cruelty defences to an action for restitution of conjugal rights but since 1884, or at least since the judgment in *Russell v. Russell*, [1895] P. 315, conduct of the petitioner had been uniformly taken into consideration and on that ground a decree might be refused.

It seems to me that, Kelly J. having found the wife guilty of conduct on which he refused alimony, that conduct is a defence to this action, no matter how genuine her desire to return to her husband may be. It is as substantial a defence as if Kelly J. had found her guilty of cruelty or adultery. Her change of heart towards her husband does not wash away the matrimonial offence of bad conduct as, if genuine, it would have washed away the bare offence of desertion.

I think I ought to say something about the genuineness of the plaintiff's intentions. I find on the evidence before me that the real reason she wishes to return to her husband is to regain custody of her children. In this view and for this purpose I think she genuinely wishes to return to her husband. It is argued that her motives for returning are of no importance, provided I find that her intention to return is sincere. Her ultimate object, it is said, is of no importance. But clearly that

cannot be so. The test is whether she desires real restitution of conjugal rights and has a corresponding willingness to render them to her husband: *H. v. H.*, *supra*, at p. 453. The letter of 16th July 1952, in which her solicitor indicates that she is willing to return, was not written without reservation; it was "without prejudice". When at the close of her cross-examination I asked her if she was willing to go back, she indicated that she was if she could get the children later; that answer did not indicate a genuine willingness to return to her husband. It lacks the kind of genuineness which the law requires.

As the change in the wife's attitude towards her husband is the only ground put forward as a change in circumstance in addition to improvement in health, I cannot find there has been a change in circumstances which would justify a variation of Kelly J.'s disposition of the claim for alimony.

I have quoted above the findings that Kelly J. made with respect to the claim for custody of the children. That part of his judgment is as binding upon me as his judgment with respect to alimony. There has not been, in my opinion, any change in circumstances which would justify me in changing his order, and none is put forward except the wife's desire to return to her husband and the fact that these three little children have been taken to the town of Prince George in northern British Columbia, where the father has placed them out with middle-aged working people. For reasons I have already stated, the desire to return to the husband is not a sufficient ground, and when one considers that at the date of the trial before Kelly J. the children were in Manitoba, their removal further west to British Columbia would seem not to improve the mother's claim. Although in *Re Harding*, 63 O.L.R. 518, [1929] 2 D.L.R. 623, an Appellate Division, consisting of Latchford C.J. and Riddell, Orde and Fisher JJ.A., held that the Court had jurisdiction to grant custody even though the infant was outside the jurisdiction, doubt has been cast on the Court's jurisdiction in the case of *Cleaver v. Cleaver*, [1949] O.W.N. 640, [1949] 4 D.L.R. 367. Therefore, I am of the opinion that it is not open to me to make any order as to custody.

I do, however, desire to say that, although I most cordially accept the findings of my brother Kelly, I could not on the evidence before me find the mother so crushingly unfitted to



have custody of or even access to her children. Three very respectable neighbour women were called as witnesses before me. They also testified at the former trial. They gave evidence that the mother had sometimes beaten the children and that she swore at them and otherwise used language in the neighbourhood which had a pronounced "billingsgate" flavour. On the evidence before me, however, I think both plaintiff and defendant were none too careful of their language, so that the children at their tender years were no doubt unable to distinguish between swearing and ordinary language. Therefore, the amount of swearing may be no guide to the love and devotion bestowed on the children by the mother; nor should the shock which the mother's conduct and language imposed upon the sensibilities of the neighbourhood necessarily be the key to whether the children should be taken away from a swearing mother and entrusted to the care of a swearing father. These respectable women, who were so shocked by the plaintiff's language and the mother's general demeanour towards the children, nevertheless said that the children were uniformly well-clothed, clean and well-fed. I cannot believe that the father was entirely responsible for the excellent appearance of the children; some of it must have been due to the diligence and industry of the plaintiff. I am convinced of this because of a body of evidence which did not come before Kelly J., although some of it could have been introduced at the first trial if reasonable diligence had been exercised.

Mr. and Mrs. Cameron, with whom the plaintiff resided for some time after she left her husband in January 1952, and again in May after the first trial, were called. I believe Mrs. Cameron when she says that the plaintiff gave to her many indications of her love for her children. I believe her when she gives in detail the various acts of tenderness which indicated love and affection towards these little children.

I am the more inclined to believe Mr. and Mrs. Cameron's evidence because of the evidence of Mrs. Korn. Mrs. Korn was obviously a woman of some education and standing in the community. The plaintiff was engaged by her as a domestic about 21st May 1952. She continued in Mrs. Korn's employment until she returned to the family residence about 12th July, and after the husband had gone to the trouble of having his wife pros-

ecuted for trespass and fined, Mrs. Korn took her back, and she remained with her until November, when Mrs. Korn dispensed with her services, being no longer able, as she said, to afford the luxury of a maid. I accept without reservation Mrs. Korn's testimony that the plaintiff was kind to Mrs. Korn's children. She looked after them well—so well, indeed, that Mrs. Korn without worry entrusted the children to the plaintiff while she accompanied her husband on a business trip to New York. She said that when she returned she found the children happy and well taken care of during her absence and her house was neat and spotlessly clean. I cannot believe that a young mother aged 28, guilty of no immoral act whatever, who attended to a young family in this way, can be entirely unfitted even to have access to her children.

I cannot disturb the judgment of Kelly J. so far as custody is concerned, but I think sufficient change in circumstances is indicated by the evidence to justify me in making an order that the plaintiff should have access to her children at all reasonable times.

The husband should pay the wife's disbursements in accordance with the Rules.

*Judgment accordingly.*

*Solicitors for the plaintiff: Duncan & Bicknell, Toronto.*

*Solicitor for the defendant: Thomas Delany, Toronto.*

[FERGUSON J.]

**Re Mercier and Mercier v. McCammon.**

*Motor Vehicles — Unsatisfied Judgment Fund — Effect of 1953 Amendments Limiting Right of Recovery out of Fund — Whether Right of Recovery “accrued” before Making of Order — The Highway Traffic Act, R.S.O. 1950, c. 167, s. 98, as amended by 1953, c. 46, s. 20.*

*Statutes — Operation — Whether Statute Retrospective — Effect on Accrued Rights—The Interpretation Act, R.S.O. 1950, c. 184, s. 14(1) (c).*

The 1953 amendments to s. 98 of The Highway Traffic Act (subss. 5a and 5b) limiting in some respects the right to compensation out of the unsatisfied judgment fund, are not retrospective, and do not affect a right to compensation accrued before the coming into force of the amendment, notwithstanding the fact that they are expressed in the form of prohibitions. *Upper Canada College v. Smith* (1921), 61 S.C.R. 413; *Hamilton Gell v. White*, [1922] 2 K.B. 422; *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, applied; *Abbott v. The Minister for Lands*, [1895] A.C. 425; *Fewtrell v. Martin Transports Ltd.*, [1938] O.R. 674, distinguished.

AN APPLICATION for an order for payment out of the unsatisfied judgment fund.

29th May 1953. The application was heard by FERGUSON J. in chambers at Toronto.

*Peter Slaght*, for the judgment creditors, applicants.

*A. R. Dick*, for the Minister of Highways, *contra*.

17th June 1953. FERGUSON J.:—This is a motion for an order directing the Minister of Highways to pay out of the unsatisfied judgment fund \$2,284 on account of a judgment for damages and \$676.83 for taxed costs, and interest thereon, plus a \$6 disbursement for a writ of *fi.fa*.

The plaintiffs ordinarily reside at Green Bay, Wisconsin. On the 27th January 1953 they recovered a judgment, in the amount mentioned, in this Court at the non-jury sittings at Belleville against the defendant, who is a soldier in the Canadian army, at that time stationed at Petawawa. After the usual attempts to collect and after making the investigations required by The Highway Traffic Act, R.S.O. 1950, c. 167, the plaintiffs launched this application for payment out of the fund.

The only objection to the plaintiffs' motion is that the Legislature of Ontario, by an amendment to The Highway Traffic Act which came into force on the 2nd April 1953, c. 46 of that year, has prohibited the payment of the moneys out of the fund. The amendment to The Highway Traffic Act which I have referred to has not yet been published by the Queen's Printer but may be found in Bill 129, s. 20(4) and reads as follows:



"The said section 98 is further amended by adding thereto the following subsections: . . . .

"(5b) The Minister shall not pay out of the Fund any amount in respect of a judgment in favour of a person who ordinarily resides outside of Ontario unless such person resides in a jurisdiction in which recourse of a substantially similar character to that provided by this Part is afforded to residents of Ontario."

It is agreed by counsel that Wisconsin is not a jurisdiction in which recourse of a substantially similar character to that afforded by the Ontario Highway Traffic Act is afforded to residents of Ontario. In Wisconsin there is no fund to which Ontario citizens may turn for help. It is, however, not denied by counsel for the Minister that prior to the amendment we are concerned with the unsatisfied judgment fund, if the conditions required were satisfied, was available to all persons obtaining a judgment in Ontario for damages on account of injury, etc., occasioned in Ontario by a motor vehicle, no matter in what jurisdiction the injured party resided.

The plaintiffs contend that the amendment does not affect their right to be compensated out of the fund. It is argued that their right to be compensated out of the fund accrued at the date of the judgment. Counsel for the Minister, on the other hand, argues that the right to be compensated is a statutory right and that the right to take advantage of a statute is not an accrued right. He argues that the plaintiffs have not an accrued right to be compensated out of the fund until they have satisfied all of the requirements of the statute and have obtained an order for payment out. Counsel further argues that in any event the Act prohibits the Minister to pay out, and that a statute which prohibits the doing of an act is always interpreted as retrospective.

In determining whether the amendment should be treated as a prohibition, one must first examine the provision in s. 98 of the Act which provides:

"(4) If the judge is satisfied,

"(a) of the truth of the matters shown by the applicant as required . . . the judge may make an order directed to the Minister requiring him, subject to subsection (5), to pay from the Fund the amount of the judgment or the balance owing thereon.

"(5) The Minister shall not pay out of the Fund under an order,

"(a) more than \$5,000.00. . . ."

The principal part of the section authorizes the judge to make an order directing the Minister to pay out. The limitation imposed by subs. 5 is therefore in the nature of a proviso, so that, expressed shortly, the meaning is that the judgment creditor has the right to have the Court order the Minister to pay out of the fund not more than the sum of \$5,000, etc. The right of the judgment creditor is limited by subs. 5, but limited only to that extent. The recent amendment disqualifies a certain class of persons from taking advantage of the right to compensation which they had under the former law. The draftsman of the amendment has for convenience followed the form of s. 98 as it stood, which at first sight gives the amendment the appearance of making the act of payment out to the plaintiffs illegal by actually forbidding it to be done: *Metropolitan Water Board v. Dick, Kerr and Company, Limited*, [1918] A.C. 119 at 128. But, as was said by Lord Findlay in that case, to make a case of illegality it must be permanent. It is plain that the amendment merely postpones to an indefinite time the plaintiffs' right to compensation, so I think this amendment should not be treated as an absolute prohibition but looked at as the Supreme Court of Canada did in *Upper Canada College v. Smith*, 61 S.C.R. 413, 57 D.L.R. 648, [1921] 1 W.W.R. 1154.

That was a case in which the question was whether the amendment to The Statute of Frauds, with respect to actions on agreements to pay a commission on a real estate transaction, was retroactive. That amendment, in language familiar to all lawyers, read: "No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless. . . ."

Duff J., as he then was, at p. 418 said: "The plaintiff's right at the time of the passing of the Act was a valuable right, a right capable of being appraised in money; after the passing of the Act it became, if the defendant's construction is the right one, deprived of all value. It is not of any importance that the right of action had not accrued when the statute was passed, for 'words not requiring a retrospective operation so as to affect an existing status prejudicially ought not to be so construed': *Main v. Stark*, 15 App. Cas. 384 at page 388."

I think a fair conclusion to be arrived at on reading the judgment of Duff J. is that even if a statute uses imperative language it is not to be so construed as to take away a property-right unless the words of the statute clearly and unambiguously require this to be done.

But it is said by counsel for the Minister that the right which the amendment takes away is not an accrued right; that the right is not accrued until an order for payment out is made.

*Abbott v. The Minister for Lands*, [1895] A.C. 425, was a case involving the right of a settler in Australia to make conditional purchases of additional land. He had been settled under an Act of 1861 which gave him the right to make certain conditional purchases. That Act was repealed in 1884 by an Act which provided that: "All rights accrued and obligations incurred or imposed under or by virtue of any of the said repealed enactments shall . . . remain unaffected by such repeal". The plaintiff had done nothing by way of making an application to purchase the lands in question conditionally before the repealing Act of 1884. The Lord Chancellor in the judgment of the Privy Council said at p. 431: "They [their Lordships] think that the mere right (assuming it to be properly so called) existing in members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment."

But here the plaintiffs had done a great deal to avail themselves of the right to compensation out of the fund. They had obtained the judgment on the 27th January 1953. They examined the defendant as a judgment debtor on the 27th February 1953, and although the affidavit on which the application is based is not sworn until 21st April, it is to be remembered it is sworn at Green Bay, Wisconsin, and clearly some considerable time was required to collect the facts and prepare it.

In *Hamilton Gell v. White*, [1922] 2 K.B. 422, it was held that under The Agricultural Holdings Act, 1908, where a tenant had become entitled to compensation by reason of the landlords having given him notice to quit, the tenant had acquired a right to compensation which had not been lost by the repeal of the Act before an award of compensation had been made, and that the tenant was entitled to take proceedings necessary for



its recovery. I think, therefore, that the right to be compensated out of the unsatisfied judgment fund was an accrued right at the date of the amendment.

Accrued rights are protected by The Interpretation Act, R.S.O. 1950, c. 184, s. 14:

“(1) Where an Act is repealed or where a regulation is revoked, the repeal or revocation shall not, save as in this Act otherwise provided. . . .

“(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, regulation or thing so repealed or revoked;”

If I am right in my view that the amendment is in truth a repeal in part of s. 98 and that the plaintiffs had acquired the right to be compensated out of the fund before that repeal, The Interpretation Act preserves their rights.

In my opinion, the amendment is merely a limitation on the existing right of a judgment creditor to have the Court make the order. It does not make illegal that which the statute gave to the judgment creditor the right to do, namely to apply for and obtain from the Court an order for payment out of the fund. That being my view of the effect of the statute on the plaintiffs' rights, there is nothing in the amendment which takes it out of the well-known and understood law stated by Willes J. in *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1 at 23, and referred to in *Upper Canada College v. Smith*, *supra*, and almost every case dealing with retroactive legislation:

“Retrospective laws are, no doubt, *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future Acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. . . . Accordingly, the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.”

As Duff J. (as he then was) said in *Upper Canada College v. Smith*, *supra*, at p. 417, where he makes an exhaustive review of the cases and the authorities: “ . . . speaking generally it would not only be widely inconvenient but ‘a flagrant violation of natural justice’ to deprive people of rights acquired by trans-

actions perfectly valid and regular according to the law of the time”.

Again at p. 419: “Examples may be multiplied in which judges of very high authority have said that the intention to affect prejudicially existing rights must appear from the express words of the enactment, e.g., by Fry J., in *Hickson v. Darlow* (1883), 23 Ch. D. 690 at page 692: . . . ‘they are not to have a retrospective operation unless it is expressly so stated.’ ”

At any rate, I think that it is a universally accepted law that the intention to make a statute retroactive must appear from the words of the statute itself. There is, in my opinion, nothing in the statute itself which, in plain and unambiguous language, makes me think that the Legislature intended the amendment to operate retroactively.

There is no clause such as the one dealt with in *Fewtrell v. Martin Transports Ltd.*, [1938] O.R. 674, [1938] 4 D.L.R. 305, 48 C.R.C. 415. When The Trustee Act was amended so as to provide that no damages should be allowed for the death or for the loss of expectation of life, the Legislature provided that the amendment should not apply to pending litigation. It was held, applying the maxim *expressio unius est exclusio alterius*, that the Legislature having mentioned one class of cases which the legislation should not affect, it did, by implication, affect all other classes of case.

It is my opinion, therefore, that the plaintiffs’ right to compensation out of the unsatisfied judgment fund is not barred by the amendment.

The amendment to The Highway Traffic Act also enacts a new subs. 5a of s. 98, as follows:

“(5a) The Minister shall not pay out of the Fund any amount for interest on a judgment or interest on costs.”

It seems to me to follow clearly from what I have said that the claim of the plaintiffs to interest, which was undoubted prior to the amendment, is not barred and that they are entitled to interest on both the judgment and the costs in accordance with the practice before the amendment.

The applicants are entitled to the costs of the motion which I think, in this case, should be taxed.

*Order accordingly.*

*Solicitors for the judgment creditors, applicants: Robb, Ross, Cass & Hurley, Belleville.*

[WELLS J.]

**Buckley v. Lever Brothers Limited.**

*Sale of Goods — Implied Conditions and Warranties — Purchase for Particular Purpose — Reliance on Seller's Skill or Judgment — Fitness for Purpose — Sale by Description — Goods to be of Merchantable Quality — The Sale of Goods Act, R.S.O. 1950, c. 345, ss. 15(a), (b), 51.*

The plaintiff, in response to an advertisement published by the defendant, bought from it a quantity of plastic clothespins. One of these clothespins, when the plaintiff attempted to use it in the ordinary way, shattered, one fragment striking the plaintiff's eye, in consequence of which she lost the sight of that eye. The expert evidence was to the effect that the material of which the clothespins were made was highly brittle, with very little power of flexion, and that when it shattered the fractures were generally irregular and sharp.

*Held*, the defendant was liable for breach of both implied conditions (which, in the events that had happened, had become warranties) in s. 15 of The Sale of Goods Act. *Grant v. Australian Knitting Mills, Limited et al.*, [1936] A.C. 85, applied. Having regard to the terms of the advertisement, it must be concluded that the defendant knew that the clothespins were required for the purpose of their ordinary and normal use, and they were unfit for that purpose. It should also be concluded that the plaintiff relied upon the defendant's skill or judgment. *Medway Oil and Storage Company, Limited v. Silica Gel Corporation* (1928), 33 Com. Cas. 195, applied. By offering these clothespins for sale under the premium scheme the defendant made the supplying of clothespins part of its business, and they were accordingly goods of a description which it was in the course of the defendant's business to supply. *Scott & Co. v. Solomon*, [1905] 1 K.B. 577, applied. Further, the sale was one by description, as that term was defined in the *Grant* case, *supra*, and the clothespin, being in the same condition at the time of the accident as at the time of the sale, was clearly not of merchantable quality at the time of the sale.

AN ACTION for damages.

1st and 2nd December 1952. The action was tried by WELLS J. without a jury at Ottawa.

*G. E. Beament, Q.C.*, and *R. B. Hutton*, for the plaintiff.

*W. L. N. Somerville*, for the defendant.

*J. W. Thompson, Q.C.*, for Rogers Plastics Corporation, third party.

8th July 1953. WELLS J.:—When this case came on to trial it appeared that the pleadings in the third party proceedings were not complete. The plaintiff, however, desired to proceed to trial. As the action was framed it appeared that the necessity for proceeding with the third party proceedings would depend on the result in the original action, and in these circumstances I came to the conclusion that I should accede to the plaintiff's desire and proceed with the trial. However, I allowed Mr. J. W. Thompson, Q.C., who appeared for the third party Rogers



Plastics Corporation, to appear at the trial and to take such part in it as he deemed advisable. This procedure was not objected to by the plaintiff or the defendant.

The facts in the case are reasonably simple, but the results which flow from them are not so clear.

At the opening of the trial certain admissions were made on behalf of the defendant, Lever Brothers Limited, which are as follows:

"1.—During the month of January and the first seventeen days of the month of February, 1951, Lever Brothers carried out a sales promotion scheme to increase the sale of its soap products, whereby it made a special offer to send a plastic clothespin apron and twelve plastic clothespins to any member of the public who accepted by mailing in 50c. and two box tops from certain of the defendant's soap products.

"2.—The terms of the offer made by the defendant in connection with the above-mentioned scheme, are more particularly set forth in the advertising copy (exhibit 1 to the examination for discovery of James Carman Dunlop as an officer of the defendant corporation) and as made in the Ottawa Evening Citizen of 8 January, 1951, as shown in the photostat of page 6 of the Ottawa Evening Citizen of 8 January, 1951, (exhibit 2 to the examination for discovery of the said James Carman Dunlop).

"3.—The apron and clothespin sets were purchased by the defendant from Premiumwares Registered of the City of Toronto under a contract which called for Premiumwares Registered to receive all acceptances of the defendant's special offer and to mail out the apron and clothespin sets so ordered.

"4.—Under its contract with Premiumwares Registered the defendant purchased a total of 65,000 apron and clothespin sets at 42c. each, sales tax included, packed and ready for mailing. Out of the 50c. received by Premiumwares Registered from each person accepting the special offer, 42c. was refunded to the defendant and 8c. was retained by Premiumwares Registered to cover mailing and handling charges. During the period from inclusive 10th January, 1951, to 16th February, 1951, 62,229 apron and clothespin sets were mailed by Premiumwares Registered and during the period from inclusive 17th February, 1951,

to 27th April, 1951, 2,676 such sets were mailed by Premiumwares Registered, in each case to members of the public who accepted the defendant's special offer."

The plaintiff, who was a woman of some 29 years of age, is the wife of a permanent army officer, Captain R. R. Buckley, and at the time of the accident which occasioned this action was the mother of one child. She has subsequently had another child. Both children are very young.

In the month of January 1951 she saw an advertisement in the Ottawa Evening Citizen which provided in part:

"SPECIAL OFFER

GAY 'GINGHAM CHECKED' CLOTHESPIN APRON

In pliable Red & White Koroseal

with 12 PLASTIC CLOTHESPINS

ONLY 50c.

"PLUS a boxtop or wrapper from any two of these soaps [Rinso, Lux, Surf, Sunlight, Lux Soap, Lifebuoy]. The prettiest, most practical apron you ever saw—at the thriftiest price ever! Made of sturdy Koroseal that won't crack under the hardest wear. And it comes complete with a dozen brightly coloured plastic clothespins of exclusive design!"

She cut out the coupon in the advertisement and sent it to the address given with 50c. and two labels from two packages of soap made by the defendant. The coupon which she sent is in the following form:

"Gentlemen: I enclose 50c. in coin plus a box top or wrapper from any two of these soaps: RINSO, NEW LUX, SURF, SUNLIGHT, LUX TOILET SOAP, LIFEBOUY.

"Please send me your clothespin apron with 12 plastic clothespins.

"Lever Apron, Box 768, Toronto, Ont.

"Name .....

"Address .....

"Please do not send stamps or cheques. This offer expires February 17, 1951."

It appeared that this premium offer was very popular. The plaintiff did not immediately receive the articles for which she had sent and instead a postcard was sent to her explaining that she would receive them in two or three weeks. Eventually—as she says, she cannot be precise about the dates, nor would I expect her to be—she received towards the end of February a brown envelope which contained a plastic apron and wrapped in it twelve plastic clothespins which corresponded with the description in the advertisement she had first seen. She says she threw the envelope away and started to use the apron and kept the clothespins in a cupboard in the kitchen to which only her husband and she had access, apparently a cupboard above a refrigerator and sink.

It was her habit to do her own laundry for the family and she did it using the facilities of the apartment-house in which she lived and then hung her wet clothes in a drying-room in the basement. At the beginning of May she had started to use some of the plastic clothespins and the evidence is that on the day in question, that is, about the 15th May, they had been in use for perhaps three weeks, and that day was about the third time they had been used. She still had some wooden clothespins which she had been using previously and some plastic clothespins in a small fruit-basket in which she kept them.

While she was engaged in the act of hanging up a bedsheet she heard a “pop” and she says she “saw it coming”. It appears that she was hit in the eye with a fragment of one of the plastic clothespins which broke as she put it over the sheet to secure it on the clothes-line. She says the next sensation that she had was that water was gushing out of her eye. It would appear to be beyond question on the evidence that what had happened is that one of the plastic clothespins had shattered in her hand and that a piece having a very sharp point had flown into the air and had gone into her eye, injuring it to an extent which destroyed the lens of the eye. In the result she has lost the sight of this eye for all practical purposes. The optic nerve is not destroyed and if she were to lose the sight of her remaining eye she could apparently be fitted with a lens which would again give her vision in this eye, very much in the manner of a person



who has had a cataract operation. That cannot be done while she has normal sight in her remaining eye since the result, according to the medical evidence, would be that she would see double and that that would be perhaps a worse condition than the present. Whether non-use of the optic nerve will eventually lead to atrophy was not made clear, but it is amply clear that for all practical purposes the plaintiff has lost the sight of her eye at the present time.

As to the manner in which she had hung the sheet on the line, she said she had put the two ends together and then thrown the sheet folded in this fashion over the line, and put the peg on it. She said she ordinarily put five pegs on a sheet. I do not need to go into what happened afterwards, or the extent of her treatment, at the present time.

The plaintiff is suing the defendant strictly in contract, basing her claim for damages as a result of her injuries on a breach of the implied warranties as set out in s. 15(a) and (b) of The Sale of Goods Act, R.S.O. 1950, c. 345, which read as follows:

"15. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

"(a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

"(b) Where goods are bought by description from the seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of a merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

The right of action as a result of the breach is found in s. 51 of the same statute.

During the course of the trial a considerable amount of evidence was given, some by experts and by an officer of the firm manufacturing the plastic clothespins in question. It would appear to be clear from this evidence that these clothespins were made of a plastic product known as polystyrene. Witnesses, experts, for the plaintiff, explained the properties of this chemical product, pointing out that its chief drawback was its brittleness, and that its power of flexion before breaking is apparently low. It is apparently also true that when it shatters it discharges a considerable release of energy and fractures, as a rule, are irregular and sharp.

Evidence was also given by an officer of the manufacturing company, the Rogers Plastics Corporation, that during the course of the company's existence it had manufactured something like five hundred million clothespins of this type and this was the first time that any complaint had been made to it about anyone receiving an injury from one of the pins breaking.

Under s. 15(a) of The Sale of Goods Act, there is an implied condition which, on events having happened such as here, would become a warranty, "that the goods shall be reasonably fit for . . . the particular purpose for which the goods are required". This arises only where the buyer expressly or by implication makes known to the seller particular purposes for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply.

Paragraph *b* applies to goods bought by description from a seller who deals in goods of that description, in which case there is an implied condition that the goods shall be of a merchantable quality. It is apparent from the authorities that this warranty is as to the condition of the article sold at the time of the completion of the sale.

I cannot help coming to the conclusion on the facts that, at the time this clothespin shattered and involved the plaintiff in the accident from which she still suffers, it was substantially in the condition of a new clothespin and was in the condition it

had been in at the time it was delivered to the plaintiff. At most, it may have been used two or three times, but its use had not been substantial. It may not have been used previously at all. It is quite obvious, from examining the fragments, that there was no serious sign of deterioration of the clothespin apparent to the plaintiff, if she had by any chance understood them. I think this conclusion may be important, because it is certainly not the intention of The Sale of Goods Act to make a vendor an insurer, as it were, for the purchaser; and whatever conditions or warranties there were at the time of the transaction, they would apply, in my opinion, only if the goods at the time of the accident were in the condition they were in at the time of the transfer to the purchaser. As I have said, on any reasonable interpretation of the evidence, this would appear to be the case here. It is significant that the witness Reid, called by the defendant, could see no signs of any stress-marks on the pin which had fractured and caused the trouble.

The high-water mark of liability in cases of this sort is perhaps reached in the opinion of the Judicial Committee of the Privy Council as it is expressed in the case of *Grant v. Australian Knitting Mills, Limited et al.*, [1936] A.C. 85, [1936] 1 W.W.R. 145. The opinion of the Committee was delivered by Lord Wright, and at p. 98 he discusses the import of s. 14 of the South Australian Sale of Goods Act, which is in similar terms to our s. 15. When these conclusions are related to the facts of the *Grant* case, their application to the facts of the case at bar seems almost irresistible. In the *Grant* case the appellant, Dr. Grant, went into a retail shop and purchased two suits of underclothing. The retailer, in the ordinary course of business, had at some previous date purchased them with other stock from the Australian Knitting Mills, Limited, and they were of a brand known as "Golden Fleece". The retailers were held liable under s. 14 of The Sale of Goods Act. In discussing the section Lord Wright said, at p. 98:

"Sect. 14 begins by a general enunciation of the old rule of caveat emptor, and proceeds to state by way of exception the two implied conditions by which it has been said the old rule has been changed to the rule of caveat venditor: the change has



been rendered necessary by the conditions of modern commerce and trade. The section has been recently twice discussed by the House of Lords, once in *Medway Oil and Storage Co. v. Silica Gel Corporation*, 33 Com. Cas. 195, and again in *Cammell Laird & Co. v. Manganese Bronze and Brass Co.*, [1934] A.C. 402. There are numerous cases on the section, but as these were cited below it is not necessary to detail them again. The first exception, if its terms are satisfied, entitles the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied, but only if that purpose is made known to the seller 'so as to show that the buyer relies on the seller's skill or judgment'. It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take a case like that in question, of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment; the retailer need know nothing about the process of manufacture: it is immaterial whether he be manufacturer or not: the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make: the goods sold must be, as they were in the present case, goods of a description which it is in the course of the seller's business to supply: there is no need to specify in terms the particular purpose for which the buyer requires the goods, which is none the less the particular purpose within the meaning of the section, because it is the only purpose for which any one would ordinarily want the goods. In this case the garments were naturally intended, and only intended, to be worn next the skin. The proviso does not apply to a case like the sale of Golden Fleece make such as is here in question, because Golden Fleece is neither a patent nor a trade name within the meaning of the proviso to exception (i.). With great deference to Dixon J., their Lordships think that the requirements of exception (i.) were complied with. The conversation at the shop in which the appellant discussed questions of price and of the different makes did not affect the fact that he was substantially relying on the retailers to supply him with a correct article.

"The second exception in a case like this in truth overlaps in its application the first exception; whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination: that is clear from the proviso, which shows that the implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make. The appellant was satisfied by the appearance of the underpants; he could not detect, and had no reason to suspect, the hidden presence of the sulphites: the garments were saleable in the sense that the appellant, or any one similarly situated and who did not know of their defect, would readily buy them: but they were not merchantable in the statutory sense because their defect rendered them unfit to be worn next the skin. It may be that after sufficient washing that defect would have disappeared; but the statute requires the goods to be merchantable in the state in which they were sold and delivered; in this connection a defect which could easily be cured is as serious as a defect that would not yield to treatment. The proviso to exception (ii.) does not apply where, as in this case, no examination that the buyer could or would normally have made would have revealed the defect. In effect, the implied condition of being fit for the particular purpose for which they are required, and the implied condition of being merchantable, produce in cases of this type the same result. It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woollen under-garments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations."

It is obvious that the plaintiff in this case, to bring herself within the first exception of s. 15, must show, (a) that she made known to the seller, expressly or by implication, the par-

ticular purpose for which the goods were required, so as to show that she relied on the seller's skill or judgment, (b) that the goods were of a description which it was in the course of the seller's business to supply; and, if she does show these two things, there is then an implied condition that the goods should be reasonably fit for the purpose for which they were sold. In this particular case, the advertisement offered the apron "with 12 plastic clothespins"; later on in the advertisement they are described as "a dozen brightly coloured plastic clothespins of exclusive design". I think, on any fair reading of the authorities, I must come to the conclusion that by implication at least the seller knew the purpose for which these goods were required and for which they were in fact used, that is, the ordinary and normal use of clothespins to hang up clothing to dry after it had been washed.

It would also seem to me, on a fair reading of the passage I have quoted from Lord Wright's judgment, that the plaintiff can be brought under the second exception of the section, because it would seem to be amply clear from the form of the advertisement, to use Lord Wright's words, that the clothespins were purchased by the plaintiff as a thing corresponding to a description—in this case, "12 plastic clothespins" or, to quote the advertisement further, "a dozen brightly coloured plastic clothespins of exclusive design". There is of course a great volume of law on this matter, and I was referred to many cases. These I have read. The opinion of the Judicial Committee in the *Grant* case, however, would appear to me to summarize and supersede these to such a degree that there is no great point in my labouring or examining them in detail.

As to the problem of whether the plaintiff in this case relied on the seller's skill or judgment, brief reference may be made to the speech of Lord Sumner delivered in the House of Lords in the case of *Medway Oil and Storage Company, Limited v. Silica Gel Corporation* (1928), 33 Com. Cas. 195 at 196-7. Lord Sumner said:

"On a scrutiny of section 14(1) of the Sale of Goods Act, I think these propositions may be stated upon it: (a) The buyer's reliance is a question of fact to be answered by examining all that was said or done with regard to the proposed transaction on either side from its first inception to the conclusion of the agreement to purchase. (b) The section does not say that the reliance on the seller's skill or judgment is to be exclusive of all



reliance on anything else, on the advice, for example, of the buyer's own experts or the use of his own knowledge or common sense. Indeed it would never be possible to be sure that the element of reliance on the seller entered into the matter at all unless the buyer made some statement to that effect. It follows that the reliance in question must be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity. (c) This warranty, though no doubt an implied one, is still contractual; and, just as a seller may refuse to contract except upon the terms of an express exclusion of it, so he cannot be supposed to consent to the liability which it involves unless the buyer's reliance on him, on which the liability rests, is shown, and shown to him. The Tribunal must decide whether the circumstances brought to his knowledge showed this to him as a reasonable man or not; but there must be evidence to bring it home to his mind before the case for the warranty can be launched against him.

"My Lords, I would like to add a few commonplace observations. One naturally asks, why should any buyer ever be supposed not to rely on the seller's skill or judgment? It can do him no harm to do so, and may do him some good. Till the seller refuses to deal at all unless any such reliance is renounced surely a man of sense must be deemed to want to get for himself all that the law allows. . . . In this case I rather think that this may have been the view present to the mind of Rowlatt J. . . . He would appear to have thought that reliance on the buyer's part follows almost as a matter of course from the communication of his purpose whenever he knows less than the seller does about the substance which he is minded to buy. My Lords, I think this will in most cases be a question of degree. To go into a chemist's shop for something for your toothache; to order milk for your baby from a dairy; to write to a coal merchant that your ship is lying in his port and to ask him to bunker her, are simple cases in which reliance is not indeed presumed in law but is obvious in fact. But reliance on another and not on yourself is not a course which is always either obvious or probable; it may be so far from what prudence would dictate as to be neither."

The case closest on its facts to the case at bar is undoubtedly the decision in *Morelli v. Fitch and Gibbons*, [1928] 2 K.B. 636. This was a decision of a Divisional Court on appeal from the Edmonton County Court and, while there was there even more

clearly than in the case at bar a purchase of goods by description, it is very hard to differentiate the *ratio decidendi* of the Divisional Court's judgments from the case I am presently considering. It is interesting both for the comments of Acton J. as to what is a sale by description and as to what is meant by the word "merchantable", at pp. 641-2, and for the reasons of Branson J.

At p. 643 Branson J. said this: "The next point taken was that there was no evidence upon which the learned county court judge could come to the conclusion that this bottle was not of merchantable quality, for it was contended that the defect in it, which caused it to break, was not a defect which an ordinary reasonable examination would have disclosed, and, therefore, inasmuch as the plaintiff, if he had been minded to resell, could have done so, it could not be said that the bottle was not of merchantable quality. In my view that contention is entirely unsound. I think that the question whether the article is of merchantable quality or not depends upon the true state of the article and not upon whether its state can be discovered by a reasonable examination of it. That seems to me to follow quite clearly from the proviso to s. 14, sub-s. 2, of the Sale of Goods Act, 1893, which makes it clear that, even if the buyer has examined the goods, the implied condition makes the seller liable for a latent defect in those goods. This ground also to my mind fails, and the result is that I agree that the learned county court judge has come to a correct conclusion on the law of this case."

All these problems, which have exercised the Courts for so long, would seem to be decisively and conclusively dealt with in the judgment in the *Grant* case which I have already examined.

In these circumstances, I must come to the conclusion that the plaintiff is entitled to succeed under both of the exceptions of s. 15, and she should have judgment accordingly. She has had considerable pain and suffering, and for all practical purposes she has lost the use of one eye. This is a very serious injury and one that will to a substantial degree limit her activities for the rest of her life. Giving the matter the best consideration I can, I would fix her damages for pain and suffering and disability at \$6,500. Her out-of-pocket expenses were proved at \$189.32. She should therefore have judgment for \$6,689.32 and costs.

24th July 1953. WELLS J.:—It has been brought to my attention that in giving my reasons for judgment in this action

I did not deal with the condition which I mentioned under s. 15(a), that the goods must be of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not.

In respect of this, I think I should first observe that the defendant company here, by offering these clothespins for sale under the premium scheme in question, made it part of their business to supply clothespins. They, in effect, offered them generally to the public for their own advantage; they chose to deal in plastic clothespins, and in fact made it part of their business so to do. This is not a case where a purchaser comes to a vendor and asks the vendor to obtain for him, as a special favour, something which is entirely outside of the ordinary run of articles sold by the vendor. It is in fact the reverse of that. It is a case, as I have said, where the vendor chose to make the sale of the clothespins under the premium scheme part of its business operation.

The reasoning employed in the case of *Scott & Co. v. Solomon*, [1905] 1 K.B. 577, is also, I think, in point. In that case, which was a case stated to the Court of King's Bench by the justices, the appellants Scott & Co., who were tea-merchants, were charged with dealing in plate without a licence, contrary to The Revenue Act of 1867. What had happened was that they had in effect set up a premium scheme and with every packet of tea sold they gave a coupon, for which they offered various prizes, consisting in part of gold watches and articles of plate. In disposing of the stated case Lord Alverstone C.J. held that this action by Scott & Co. was a dealing in plate for which a licence was required, and that they had, therefore, been properly convicted. Reference may be made to his judgment at pp. 579-80 of the report.

Where a vendor deliberately deals in some commodity for the purpose of his business, he, in my view, makes it part of his business to supply such articles, and such, I think, is the situation here as between the plaintiff and the vendor.

*Judgment for plaintiff.*

*Solicitors for the plaintiff:* Beament, Fyfe & Ault, Ottawa.

*Solicitors for the defendant:* Borden, Elliot, Kelley, Palmer & Sankey, Toronto.



[COURT OF APPEAL.]

**Storms v. M. G. Henniger Limited.**

**Gonu v. M. G. Henniger Limited.**

*Waters and Watercourses — Rights of Adjoining Owners — Natural User of Higher Land — Interference with Flow of Surface Water or Underground Water on to Neighbouring Lands — Whether Cause of Action Exists.*

The defendant, a road-building contractor, entered upon the lands of one P, with his permission, and excavated and removed a quantity of sand and gravel. Two owners of adjoining lands sued for damages arising out of interference, in consequence of the defendant's operations, with the flow of water. The first plaintiff, S, alleged that water, formerly flowing into springs on P's land and thence by a natural watercourse on to and across S's land, had been diverted to run into the excavation, from which it could escape only by seepage through the substrata, this in turn causing water to rise on S's land, resulting in serious damage. The other plaintiff, G, complained that water that formerly flowed on to his land, and had been used for many years in the operation of a cheese factory, had been diverted.

*Held*, both actions must fail.

As to G's action, it was not founded on the rights that a riparian owner had in water flowing through a natural watercourse with a well-defined channel, but was rather based upon an alleged right, in the nature of an easement appurtenant to his land, to receive water from a spring on P's land. The evidence did not show any interference by the defendant with the water after it reached the spring, but rather a diminution in volume of the water going to the spring. G. could therefore succeed only if he could establish a right to the uninterrupted flow to the spring of subterranean water not flowing in a defined channel. It was not suggested that there was an express grant of such a right, but it was urged that there was an implied grant in the nature of an easement. But the use of P's land was a natural user, and the Court could not imply a covenant running with the land, binding on the grantor at the time of severance and on his successors in title, preventing them from using the land near the spring for any ordinary purpose, if that use interfered in any way with the supply of water to G's land. Finally, such a right could not be acquired by prescription. *Chasemore v. Richards* (1859), 7 H.L. Cas. 349; *Dickinson et al. v. The Grand Junction Canal Company* (1852), 7 Exch. 282; *Acton v. Blundell et al.* (1843), 12 M. & W. 324; *Brain v. Marfell* (1879), 41 L.T. 455, applied.

S's action, also, arose out of a natural user of the land by P, and the defendant had a right, with P's permission, to do all the things alleged. The water that flowed into the excavation reached it in the ordinary course of drainage of subterranean water, and its escape by seepage was not a violation of any right of S, and it was not accumulated on P's land as the result of any unnatural user, as was the case in *Rylands et al. v. Fletcher* (1868), L.R. 3 H.L. 330. The principle of that case could apply only if there were both (1) an "escape" from the land of something likely to do mischief if it escaped and (2) a non-natural user of the land. *Read v. J. Lyons & Company, Limited*, [1947] A.C. 156; *Rouse v. Gravelworks, Limited*, [1940] 1 K.B. 489, applied.

APPEALS by the plaintiffs in two actions from the judgment of McLennan J. dismissing each action.

12th May 1953. The appeals were heard together by LAIDLAW, HOPE and F. G. MACKAY JJ.A.

*F. C. Forster, Q.C.*, for the plaintiffs, appellants: Gonu and his predecessors in title had a claim to the water supply from the spring and channel as lower riparian owners, and also by implied grant. [F. G. MacKAY J.A.: There was nothing said about it in the conveyance to Gonu.] No. [LAIDLAW J.A.: Is the right to take water any different from a right to take minerals or fruits? That is not an easement, is it?] This was a natural watercourse. [LAIDLAW J.A.: That would possibly be true if your claim were in respect of an open channel; the right to pipe water is different from the rights of a riparian owner.] Even with a pipe an easement may be acquired. [LAIDLAW J.A.: The fact that the pipe may be laid in the middle of the stream does not augment your rights in respect of the water in it.] Whether it is an easement or not, there was some right in favour of the cheese factory. [LAIDLAW J.A.: When the cheese factory was conveyed, you say, the owner was entitled to this water; is your argument based on the principle that a grantor must not derogate from his grant?] Yes.

As a result of the defendant's acts our cheese factory has gone out of business, since it depended upon this source of supply of pure water. We rely on *St. Mary's Milling Co. v. Town of St. Mary's* (1916), 37 O.L.R. 546, 32 D.L.R. 105.

As authority for the proposition that there was an implied grant of an easement in this water supply I refer to The Conveyancing and Law of Property Act, R.S.O. 1927, c. 137, s. 14; *Wright v. Macadam*, [1949] 2 K.B. 744, [1949] 2 All E.R. 565; *Goldberg v. Edwards*, [1950] Ch. 247.

*J. F. F. Lemieux*, for the plaintiffs, appellants: There should be a reference as to damages. We claim no more than damages; since the person who caused the damage is no longer in possession of the land we could not ask for other relief.

*J. M. Hickey, Q.C.*, for the defendant, respondent: There was no evidence of an established and pre-existing channel. A prescriptive right to an easement in an artificial watercourse, constructed only for a temporary purpose, cannot in general be acquired as against the maker of the watercourse or his successors in title: 11 Halsbury, 2nd ed. 1933, para. 630, pp. 358-9. If a man makes a watercourse leading to a mill-pond for the use of his own mill on his own land, this is for a temporary purpose because it is limited to the period during

which he uses the mill: *Burrows v. Lang*, [1901] 2 Ch. 502 at 508.

Storms's land was in the natural drainage course. There is no evidence that the water that came out of the hole went anywhere but into the bottom of the pit. The removal of the sand and gravel was a natural user of the land: 1 Halsbury, 2nd ed. 1931, p. 14; *Rouse v. Gravelworks, Limited*, [1940] 1 K.B. 489, [1940] 1 All E.R. 26. [LAIDLAW J.A.: The action is not based on negligence, but on trespass or nuisance. The mere fact that you acted in good faith is not necessarily an answer if you commit a wrong to property.] The mere discharge of water by an upper proprietor on to the land of a lower proprietor may easily establish a right on the part of the former to continue so discharging it, but the lower proprietor will have difficulty in establishing a right to have the flow of water maintained: 11 Halsbury, para. 631, p. 359; Gale on Easements, 12th ed. 1950, pp. 359 et seq.

*D. A. Lang*, for the third party: This land is spongy, and more or less permeated by water. If there has been any tort it can only be a nuisance, committed by the defendant. [F. G. MACKAY J.A.: If you authorized him to commit that nuisance on your land, would you not be liable?] We authorized him only to take gravel. There is no right of indemnity for a tortfeasor in respect of a nuisance.

*F. C. Forster, Q.C.*, in reply.

*Cur. adv. vult.*

27th May 1953. The judgment of the Court was delivered by

LAIDLAW J.A.:—The appellants brought separate actions against the respondent M. G. Henniger Limited, a road-building contractor, to recover damages alleged to have been caused by the removal of a quantity of sand and gravel from the land and with the permission of Grant Percy, who was made a third party in each action. The two actions were tried together before Mr. Justice McLennan without a jury, and after reserving judgment he endorsed each of the records as follows: "The plaintiff has no cause of action against the defendant." Accordingly, both actions were dismissed with costs by judgment dated the 16th July 1952, and the plaintiff in each case appealed to this Court. The defendant in turn gave notice of appeal in the third



party proceedings in each case. The appeals came on for hearing at the same time.

I shall consider first the case which the appellant Gonu (hereinafter for convenience referred to as "Gonu") endeavoured to establish at trial. His complaint in substance is that the defendant excavated a large quantity of sand and gravel on the land of Grant Percy lying to the north-east and at a higher elevation than the land of Gonu, and thereby diverted and abstracted water which theretofore flowed from Percy's land to his land and which had been used by him and his predecessors in title for many years in the operation of a cheese factory.

In the statement of claim the land of Gonu is referred to as "the dominant tenement" and the land presently owned by Grant Percy as "the servient tenement". The pleading sets forth that prior to 23rd July 1928 "the dominant tenement" and "the servient tenement" were included in one parcel of land owned by Nettie Percy, who conveyed "the dominant tenement" to one Thomas Craig and retained ownership of "the servient tenement" and that "the fee simple in the dominant tenement has passed through several persons to the present owner". It is then pleaded, *inter alia*:

"4. For a period of 50 years prior to the conveyance from Nettie Percy to Thomas Craig, and up to the present time, there has been a cheese factory on the dominant tenement, and the water supply for this factory has flowed continuously from a spring on the servient tenement, along a natural watercourse through a pipe under the highway, into a tank at the factory, and the overflow of water from the tank continued along the natural watercourse and carried with it the waste products from the cheese factory.

"5. The Plaintiff and his predecessors in title to the dominant tenement have always, openly and without dispute, claimed to have, and have had, the right to take water from the spring on the servient tenement and to have the water flow to the factory in the manner described in Paragraph 4. . . .

"8. . . . the Defendant's employees excavated close to the spring, and along and below the main water vein of the spring, with the result that no water has since flowed to the Plaintiff's factory."

It does not appear to me from the statement of claim that the action is founded on the natural rights that a riparian owner has in water flowing through a natural watercourse having a defined channel. It appears rather that Gonu claims a right, in the nature of an easement appurtenant to his land, to receive water from a spring on the land of Grant Percy, whereby that land is a servient tenement and the owner of it is prevented from making use of it in any way that interrupts or interferes with the source of supply. That view of the cause of action is supported by the allegation in para. 8 quoted above. It is also supported by a statement in the appellant's memorandum of law and fact that: "Our action in both cases [of Gonu and Storms] is properly brought against the Defendant for interference with the easement."

But be that as it may, the evidence adduced at trial in support of Gonu's case does not show that the defendant interfered in any way with the flow of water after it reached the spring so as to constitute an infringement of a right to have a stream (if in fact there was a stream running from the spring to and over Gonu's land) flow in its natural state without diminution or alteration. The explanation of the diminution in the volume of water reaching the spring and from there to Gonu's land is made plain by the evidence of a geologist called as a witness for the plaintiffs in the actions. He examined the site and described the formation and features of the area of the spring. The ground in the neighbourhood of the spring was "hummocky with high and low spots" and was described as "marshy" or "swampy". It is part of a rock-rimmed basin in which sands, gravels and some clays have been deposited and the natural drainage is out of that basin in a direction towards the lands of the appellants. An examination of the pit dug by the respondent disclosed that a stream of water issued from a bed of coarse sand or gravel a few feet below the lip of the pit, flowed down the side and across the bottom, and disappeared in the porous sand at the lowest corner. The flow of water into the pit is attributed to the formation of the land in that area. There are layers of sand and fine gravels sloping downward toward the area in which the spring is located and on downward toward the pit. These several layers have different degrees of permeability. The sand or gravel where the water entered

the pit transmits water very readily and at that particular level there was an underlying layer considerably less pervious. When the excavation cut through the permeable layer of sand at an elevation below the elevation of the bottom of the spring, water flowed out naturally and thus to a large extent was diverted and abstracted from the spring which had been the source of supply to Gonu. It is thus apparent that the diminished flow of water to the spring was caused by excavation of porous sand and gravel on Percy's land at an elevation lower than the bottom of the spring, thereby permitting water which percolated in an undefined course through the porous layers of sand and gravel to escape into the pit instead of to the spring. In those circumstances Gonu had no cause of action for the loss suffered by him as a result of the diminished flow of water to his land from the spring unless he had a right to the uninterrupted flow to the spring of subterranean water not flowing in a defined channel.

It was not suggested in evidence or in argument that Gonu or his predecessors in title had an express grant of such a right. It was urged that there was an implied grant in the nature of an easement appurtenant to his land preventing the use of the land in the vicinity of the spring for any purpose that interrupted, intercepted or abstracted water flowing to the spring, and that such an easement was created by reason of the fact that there was a flow of water from the spring to the land presently owned by Gonu for a period of 50 years before and at the time that parcel of land was severed from the whole parcel containing it and the land on which the spring is situate. But it is to be borne in mind that the use of the land in the area of the spring for the purpose of excavating and recovering the sand and gravel therein for building purposes is a natural user of the land. Thus, in effect, the Court is asked by counsel for Gonu to imply a covenant running with the land, binding on the grantor at the time of the severance and his successors in title, preventing them from using the land in the neighbourhood of the spring for any purpose for which it might in the ordinary course of the enjoyment of land be used if in so doing it interfered in any way with the supply of water to Gonu's land. No such grant or covenant can be implied. The Court has refused to introduce words having such effect into an agreement which



contained an express grant of the right to water in a well or spring and to continue the flow therefrom without any interruption or disturbance by the grantor or his heirs or assigns or any other person or persons whatsoever: see *Brain v. Marfell* (1879), 41 L.T. 455. *A fortiori* the Court should refuse to imply a grant as claimed by Gonu over the land owned by Percy upon which the defendant carried out its work of excavation. Finally, it is settled law that Gonu could not acquire such a right by prescription.

I refer only to a few of many cases bearing on the question in controversy. The applicable principles were settled in *Chesmore v. Richards* (1859), 7 H.L. Cas. 349, 11 E.R. 140. The plaintiff in that case was the occupier of an ancient mill on the river Wandle, and for more than 60 years he and preceding occupiers of the mill used and enjoyed, as of right, the flow of the river for the purpose of working their mill. The river was supplied in part by water produced by rainfall on a large district above the site of the mill and comprising the town of Croydon and its vicinity. The water in part flowed and percolated through the strata to the river. The Local Board of Health of Croydon sank a well in the town at a place about  $\frac{1}{4}$ -mile from the river and pumped large quantities of water for the supply of the town. By means of the well and pumping, the underground water that otherwise would have flowed and found its way to the river and so to the plaintiff's mill was diverted, abstracted and intercepted. The question in the case was whether the plaintiff could maintain an action against the defendant for the diversion, abstraction and interception of the underground water. Wightman J., who delivered the unanimous opinion of the judges, which was approved and acted upon by the House of Lords, made it plain that any right to the use of the water from the river could not be founded on a presumed grant or upon length of enjoyment, and he referred to the judgment in *Dickinson et al. v. The Grand Junction Canal Company* (1852), 7 Exch. 282, 155 E.R. 953. He then proceeded to discuss the question whether the plaintiff had a right *jure naturae* to prevent the defendant from sinking a well in his own ground and so absorbing the water percolating in and into his own ground beneath the surface, if such absorption had the effect of diminishing the quantity of water which would otherwise have found its way

into the river and by such diminution affected the working of the plaintiff's mill. He said:

"It is impossible to reconcile such a right with the natural and ordinary rights of landowners, or to fix any reasonable limits to the exercise of such a right. Such a right, as that contended for by the Plaintiff would interfere with, if not prevent, the draining of land by the owner."

Later, he said: "Such a right as that claimed by the Plaintiff is so indefinite and unlimited that, unsupported as it is by any weight of authority, we do not think that it can be well founded, or that the present action is maintainable."

Lord Chelmsford, one of the law lords who took part in the decision in *Chasemore v. Richards*, referred to *Acton v. Blundell et al.* (1843), 12 M. & W. 324, 152 E.R. 1223, and quoted the opinion of Lord Chief Justice Tindal in the Court of Exchequer Chamber in that case as follows:

"We think that the present case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure, and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of an action."

Lord Chelmsford concluded his speech in these words: "It appears to me, that reason and principle, as well as authority, are opposed to the claim of the Plaintiff to maintain an action for the interception of the underground water which would otherwise have ultimately found its way to the River Wandle . . ."

I refer next to *Brain v. Marfell*, *supra*. I quote the headnote as follows:

"Defendant sold to plaintiff a well and the right of conveying the water therefrom through pipes through defendant's

land without any interruption or disturbance by defendant, his heirs or assigns, or any other person or persons whatsoever.

"A railway company purchased from defendant's lands in the proximity of the spring, without recourse to their compulsory powers.

"The effect of the works of the railway company was to drain the water from the land before it reached the spring, in consequence of which the spring became dry and the water did not flow through plaintiff's pipes. Plaintiff sued defendant for breach of the agreement.

"*Held*, that the defendant had only conveyed the flow of the water after it had reached the spring, and therefore the draining of the water before it reached the spring was no breach.

"Judgment of Pollock, B. affirmed."

Lord Coleridge C.J. referred to an agreement between the parties containing a provision that the plaintiff should enjoy the well, or spring-water, rights and premises without any denial, interruption, disturbance, etc., and then said: "There is nothing in the words of this agreement which can give the plaintiff a right to prevent an adjoining landowner from draining the spring by preventing the water coming into it by means of underground workings, and there being no such words, we ought not to introduce them."

My opinion is that the appellant Gonu could not restrain the owner of the land in the vicinity of the spring from using it for the purpose of recovery and removal of the available sand and gravel in it. That, as I have said, was a natural user of the land and it was his right to permit the defendant to enter on the land and excavate the sand and gravel. There was no evidence of any breach of duty owing by the defendant to the plaintiff, and the learned trial judge was right in his conclusion that the appellant Gonu had no cause of action against the defendant.

I proceed to consider the case which the appellant Storms endeavoured to establish against the defendant. He pleaded, *inter alia*:

"4. There are springs of water on the Percy land and the overflow from these springs, added to the drainage of surface water, formed a natural watercourse which flowed in a well-defined channel across the said land and along and across the



area now occupied by the highway, and onto and across the land of the Plaintiff.

"5. During the month of August, 1950, the employees of the Defendant entered upon the Percy land to excavate with a mechanical shovel, and removed large quantities of gravel and other soil in an area close to, and below, the springs and water-course.

"6. The work done by the defendant's employees, as stated in paragraph 5, has caused most of the water from the springs and watercourses to run into the excavations made by the removal of the gravel and other soils. The water cannot escape from these excavations except by seepage through the substrata of soil.

"7. The water so seeping as aforesaid rises on the lands of the Plaintiff, close to his residence, causing serious damage, and among other things making the basement of his residence damp and unhealthy, weakening the foundation, filling the well with sand, and destroying about five acres of good arable land."

I observe first that the defendant by permission of the owner had a right to "[enter] upon the Percy land to excavate with a mechanical shovel, and [remove] large quantities of gravel and other soils in an area close to, and below, the springs and watercourses" (para. 5). The water that flowed into the pit excavated by the defendant reached there in the ordinary course of drainage of the subterranean water. It escaped from the pit "by seepage through the substrata of soil" as alleged by the appellant Storms (para. 6), but that fact does not constitute a violation of any of the rights of that appellant. The normal direction of flow of underground water was towards his property from the higher lands on which the pit was excavated. There was no unnatural use made of the land from which the water flowed. Finally, the damage claimed did not arise by reason of the escape of water accumulated by some unnatural use of the land from which the water flowed. It is attributable to natural conditions in the area at a higher level than the land of the appellant Storms.

The principle of law in *Rylands et al. v. Fletcher* (1868), L.R. 3 H.L. 330, is not applicable to the facts of the instant

case, but it is helpful to quote the following passage from the speech of Lord Cairns L.C.:

“[The occupiers of a close] might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place.”

That passage is quoted in *Rouse v. Gravelworks, Limited*, [1940] 1 K.B. 489, [1940] 1 All E.R. 26 at 28. I quote also the headnote to the report of that case in All E.R., as follows:

“The defendants in digging for gravel on their land created a large pit, which by natural causes filled with water and formed a lake reaching almost to the boundary of the adjoining property, of which the plaintiff was the owner. The wind blew the water thus collected on to the plaintiff’s land, and cause damage by erosion:—

“HELD: no action would lie for such damage as the water had accumulated only as a result of the defendants’ natural user of their land and had escaped on to the land of the plaintiff only by the operation of natural causes.”

*Rylands et al. v. Fletcher*, *supra*, is discussed in *Read v. J. Lyons & Company, Limited*, [1947] A.C. 156, [1946] 2 All E.R. 471, and it is made plain that the two elements must be present to make *Rylands et al. v. Fletcher* applicable, *viz.*, (1) the condition of “escape” from the land of something likely to do mischief if it escapes, and (2) the condition of “non-natural use” of the land.

In the appeal brought by the plaintiff Storms, I reach the conclusion that the trial judge was right in holding that the plaintiff had no cause of action against the defendant.

The appeal by the plaintiff Gonu and also the appeal by the plaintiff Storms should be dismissed with costs in each case to be paid by the appellant to the respondents but, the appeals having been argued together, each respondent should be allowed

only one counsel fee, one-half of which should be paid by each appellant.

*Appeals dismissed with costs.*

*Solicitor for the plaintiffs, appellants: J. F. F. Lemieux, Kingston.*

*Solicitors for the defendant, respondent: Dulmage & Boyd, Smiths Falls.*

*Solicitors for the third party, respondent in the defendant's appeal: Cunningham & Cunningham, Kingston.*

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[COURT OF APPEAL.]

**James et al. v The Hydro-Electric Power Commission  
of Ontario.**

*Public Utilities — Powers of Provincial Power Commission — Expropriation of Land for Purposes of Commission — Authorization by Order-in-council — The Power Commission Act, R.S.O. 1950, c. 281, ss. 23, 24, 32 — The Public Works Act, R.S.O. 1950, c. 323, s. 13.*

Section 24(3) of The Power Commission Act has not the effect of giving to the Commission the powers of expropriation given to the Minister of Public Works by s. 13 of The Public Works Act. The Commission is expressly given power to expropriate, with the authorization of the Lieutenant-Governor in Council, by subss. 1 and 2(a) of s. 24, and subs. 3 cannot be construed as giving that power without subjecting it to the requirement of authorization. While there is a power to enter and expropriate under s. 32, that also is dependent upon authorization by order-in-council, and upon the due exercise of powers granted pursuant to s. 24(2)(g), and cannot be used in other cases.

Judgment of McLENNAN J., *ante*, p. 349, affirmed.

AN APPEAL by the defendant from the judgment of McLennan J., *ante*, p. 349, [1953] 2 D.L.R. 562.

14th May 1953. The appeal was heard by PICKUP C.J.O. and LAIDLAW, J. K. MACKAY, GIBSON and F. G. MACKAY JJ.A.

*L. E. Blackwell, Q.C. (C. Carrick, Q.C., with him), for the defendant, appellant:* This order-in-council should be construed as authorizing us to expropriate the respondents' lands. [F. G. MACKAY J.A.: Do you go so far as to say that the order-in-council authorizes you to expropriate lands anywhere in southern Ontario for the transmission of power from this plant?] Yes. This is more than a transmission-line connecting two power-houses; it is an essential link in the whole transmission of power. [LAIDLAW J.A.: No one questions the authority of the Commission to transmit power from one point to another; the question involved here is the power to expropriate.]



Section 24(1) of The Power Commission Act, R.S.O. 1950, c. 281, is the basis for the first section of the order-in-council, which deals only with the expropriation of the land for the site of the power-plant. That is not now in dispute. Section 2(a) of the order-in-council is taken directly from s. 24(2) (c) of the statute. It is to be noted that all the clauses of s. 24(2) are preceded by the words "the Lieutenant Governor in Council may authorize". Section 2(c) of the order-in-council is based on s. 24(2) (g). There is authority in this section for the Commission to transmit and supply electrical power. [LAIDLAW J.A.: Do you argue that that language gives you power to expropriate?] No, that is to be found elsewhere.

The expropriation was under s. 24(3) of The Power Commission Act, which makes applicable the provisions of s. 13 of The Public Works Act, R.S.O. 1950, c. 323. Section 32 of The Power Commission Act provides an alternative power which we did not use in this case, but which we could exercise. We served notice of expropriation according to The Public Works Act, and took formal proceedings according to its provisions. Section 32 gave us a complete power of expropriation, had we chosen to exercise it, but in the circumstances it seemed better to proceed the other way. The injunction should not in any event restrain us from taking other proceedings under s. 32. [PICKUP C.J.O.: Is any formality required in taking possession of lands under s. 32?] No. The section provides its own procedure; there is no formality required for going on to the land, but when the time comes for valuation there are procedural requirements. [F. G. MACKAY J.A.: You could not use s. 32 without first getting authority from the Lieutenant-Governor in Council, but you argue that once the Lieutenant-Governor in Council has authorized the erection of a power-plant you are entitled to take lands anywhere for power-lines?] Yes. [F. G. MACKAY J.A.: Then all you need is general authorization to erect a power-plant?] Yes; that has been the procedure. We take an order to expropriate land for a plant and general authority to do all other necessary things.

The Public Works Act, made applicable by s. 24(3) of The Power Commission Act, gives us power to expropriate, and it is the provision on which we have always relied. A "public work" is defined in s. 1(i) of the former Act.

[PICKUP C.J.O.: In my view, if s. 24(1) were not contained in The Power Commission Act, s. 24(3) might be wide enough to cover expropriation, provided the Commission was authorized by the Lieutenant-Governor in Council.] [LAIDLAW J.A.: I agree. The difficulty is that the Act contains an express provision as to expropriation in s. 24(1), and is that not exclusive?] I submit that there are alternative powers. I emphasize that the governing words in both s. 24(1) and s. 24(2) are "may authorize", and s. 24(3) confers powers "in addition to the powers conferred by this or any other Act". This is the "bridging" subsection to The Public Works Act. Although the Lieutenant-Governor in Council does not know where the distribution will take place, he does know that power will be distributed over the whole system in Ontario. He says in effect, erect this plant on this known location, and I empower you under s. 24(2) to distribute the power, and where it is necessary you have the additional power under The Public Works Act. The two things side by side in one order-in-council are not inconsistent, but are alternative and complementary, and are what the Legislature intended in order to provide for the erection of stations and the distribution of power.

*J. T. Weir (J. S. Boeckh, with him)*, for the plaintiffs, respondents: I adopt the reasons of the learned trial judge.

Powers of expropriation are to be strictly construed: *Harding v. The Township of Cardiff* (1881), 29 Gr. 308 at 309. It has always been held that the onus is on the expropriator to show that it has the power; if the statute does not clearly give the power, the Court will not find that it exists.

The Commission is not a "Department of the Government" of Ontario within the meaning of s. 13 of The Public Works Act: *The City of St. Catharines v. The Hydro-Electric Power Commission of Ontario*, [1930] 1 D.L.R. 409 at 418.

The appellant's powers in respect of the acquisition of land appear under the heading "Acquisition of Properties", immediately preceding s. 23 of The Power Commission Act. Under s. 23 the Commission reports to the Lieutenant-Governor in Council designating the land it wishes to purchase or expropriate. The order-in-council is expressed to be "upon the recommendation of the Commission under The Power Commission Act." Sections 23 and 24, read together, indicate that the order-in-council must

specify what lands are to be expropriated or purchased. To bring s. 24(1) into operation there must be both the recommendation of the Commission and the authorization of the Lieutenant-Governor in Council. It is to be noted that the order-in-council in this case gave the operating powers, set out in paras. *c*, *d* and *g* of s. 24(2), but not the expropriating powers. [PICKUP C.J.O.: Your argument is that the Lieutenant-Governor in Council could have authorized this expropriation under subs. 1 or subs. 2(*a*), but did not do so, and that the power cannot be taken to exist under another statute?] Yes. Section 24(3) does not come into operation until the Lieutenant-Governor in Council has authorized a compulsory taking. Section 13 of The Public Works Act cannot be brought into operation by s. 24(3) without ignoring clauses *a* and *b* of s. 13, or holding that the words "the public purposes of Ontario" not only may include a "public work" but are synonymous with that expression. The powers conferred on the Minister by s. 13 are not powers "in relation to a public work", but are wider in scope. The public purposes of Ontario are not identical with the purposes of the Commission: *Hamabal Framjee v. Secretary of State for India* (1914), I.L.R. 39 Bom. 279; Burrows, Words and Phrases Judicially Defined, vol. 4, p. 433.

*L. E. Blackwell, Q.C.*, in reply.

*Cur. adv. vult.*

1st June 1953. The judgment of the Court was delivered by

PICKUP C.J.O.:—This is an appeal by the defendant from the judgment pronounced by McLennan J. in Weekly Court at Toronto on 4th April 1953. By the judgment appealed from the appellant was restrained from entering upon certain lands of the respondents known as 193 Rosedale Heights Drive, Toronto, the judgment declaring that no part of the lands referred to became vested in the appellant. The order appealed from also directed a reference to the Master at Toronto to determine the amount of damages, if any, suffered by the respondents by reason of the filing by the appellant of the instrument purporting to expropriate the lands in question, and by reason of entry upon the lands of the respondents, and directed judgment in favour of the respondents against the appellant for such sum as might be found due by the Master in respect of such damages.



The first question involved in this appeal is whether the appellant has the powers of expropriation which it purported to exercise. The appellant purported to exercise a power of expropriation which the appellant claims to have under s. 24(3) of The Power Commission Act, R.S.O. 1950, c. 281. This subsection provides that in relation to all matters authorized by the Lieutenant-Governor in Council under s. 24 of The Power Commission Act, the appellant shall have and may exercise and enjoy, in addition to powers conferred by The Power Commission Act or any other Act, all the powers conferred upon the Minister of Public Works by The Public Works Act, R.S.O. 1950, c. 323, in relation to a public work. Section 13 of The Public Works Act authorizes the Minister of Public Works to purchase or acquire and, without the consent of the owner, to enter upon, take and expropriate any land which he may deem necessary for the public purposes of Ontario or for the use or purposes of any Department of the Government of Ontario.

Under The Public Works Act the procedure followed by the Minister is to deposit a plan and description of the land proposed to be expropriated in the proper registry office, and upon the deposit of such plan and description the land expropriated becomes vested in the Crown. Under s. 24(3) of The Power Commission Act, in the application of The Public Works Act to The Power Commission Act, the appellant is substituted for the Crown.

The result would be that if the appellant is, by s. 24(3) of The Power Commission Act, authorized to exercise the powers of expropriation conferred upon the Minister of Public Works by s. 13 of The Public Works Act, the appellant could proceed to expropriate lands by filing a plan and description in the manner provided for by The Public Works Act, if such expropriation were necessary for the public purposes of Ontario or for the use or purpose of any Department of the Government of Ontario. Thereupon the lands would become vested in the appellant, and the appellant would have the right to enter upon the lands so expropriated. Acting on the understanding that it had the power to expropriate the respondents' lands under s. 24(3) of The Power Commission Act, along with s. 13 of The Public Works Act, the appellant, on 30th May 1952, filed in the proper registry office a plan and description of the lands of the respondents which it proposed to expropriate and entered upon the lands.

The learned judge in Weekly Court held that s. 24(3) did not confer upon the appellant the expropriating power conferred upon the Minister of Public Works by s. 13 of The Public Works Act, and a perusal of the provisions of The Power Commission Act leads me to the conclusion that the learned judge was right in so holding.

Sections 23 and 24 of The Power Commission Act, which appear under the heading "Acquisition of Properties", confer certain powers upon the appellant. Section 23 provides that the appellant may report to the Lieutenant-Governor in Council designating the land which, in the opinion of the appellant, should be purchased, acquired, leased, taken, expropriated, developed, operated or used by the appellant for the purposes of the Act. Subsection 1 of s. 24 provides that the Lieutenant-Governor in Council may authorize the appellant at any time and from time to time, without the consent of the owner, to enter upon, take possession of and expropriate and use any lands. In this subsection the purpose for which the appellant may enter upon, take possession of, expropriate or use any lands is not expressed.

Subsection 2 of s. 24 provides that "In particular, but without limiting the generality of subsection 1," the Lieutenant-Governor in Council, upon the recommendation of the appellant, may authorize the appellant to do various things under clauses *a* to *n* inclusive. Among these powers which the Lieutenant-Governor in Council may, upon the recommendation of the appellant, authorize the appellant to exercise, is a power contained in clause *a* of subs. 2, which includes an express power to enter upon, take possession of, expropriate, acquire and use lands without the consent of the owner.

By an order-in-council dated 5th May 1949 the Lieutenant-Governor in Council, upon the recommendation of the appellant, authorized the appellant to acquire by purchase or without the consent of the owner to enter upon, take possession of, expropriate and use certain lands described in the schedule to the order-in-council. The lands so described are the lands expropriated by the appellant for the purposes of its power plant at Ashbridge's Bay, and do not include the lands of the respondents. Having authorized the appellant to expropriate the lands required for its plant at Ashbridge's Bay, this order-in-council authorized the appellant to exercise the powers contained in clause *c* of s. 24(2),

which powers, as expressed in the order-in-council, are as follows:

“generate and produce electrical, pneumatic, hydraulic, mechanical or other power or energy on the lands described in Schedule 1 by the use of water, coal, steam or oil, or by any other means, and transform, transmit, make available for use, distribute, deliver, sell, supply and generally use for the purposes of the Commission the electrical, pneumatic, hydraulic, mechanical or other power or energy and connect the works constructed or installed for these purposes with any other power works and with any system.”

The order-in-council also granted the powers in clause *d* of s. 24(2), which are expressed as follows in the Act: “for the purposes of clause *c* acquire by purchase, lease or otherwise, hold, improve and use real and personal property, acquire by purchase or otherwise water, coal, steam, oil and other supplies, and construct, maintain and operate works, including without limiting the generality of the foregoing, development works, generating plants, transformer stations, transmission lines, switching and regulating works, distribution lines, access and other roads, and all other equipment, plant and works and things required for or incidental to any of such purposes.”

The order-in-council also authorized the appellant to exercise the following powers taken from clause *g* of s. 24(2): “conduct, store, transmit, transform and supply that electrical power or energy and steam for the purposes of the Act, and with lines of wires, poles, conduits, pipes, motors, transformers or other conductors, equipment or devices, receive, conduct, convey, transmit, transform, distribute, supply or furnish such electrical power or energy and steam to or from or for any person at any place, through, over, under, along, upon or across any land, public highway or public place, stream, water, water-course, bridge, viaduct or railway and through, over, upon or under the land of any person.”

It will be observed that the order-in-council did not confer upon the appellant any of the expropriation powers which s. 24 authorizes the Lieutenant-Governor in Council to confer upon it, except the power to expropriate the lands required by the appellant for its plant at Ashbridge's Bay.



Apart from the powers conferred upon the appellant by s. 32 of The Power Commission Act, which will be later referred to, I am of the opinion that s. 24 requires the authority of the Lieutenant-Governor in Council to the exercise by the appellant of any power of expropriation of land, and that subs. 3 of s. 24 should not be construed as conferring upon the appellant, by the reference therein to The Public Works Act, the power of expropriation which s. 13 of The Public Works Act confers upon the Minister of Public Works, which latter power may be exercised by the Minister of Public Works without the authority of any order-in-council. To hold otherwise would mean that notwithstanding the provisions in s. 24, which seem to me plainly to require the authority of the Lieutenant-Governor in Council to the expropriation of land, the appellant could expropriate any land it required by merely obtaining from the Lieutenant-Governor in Council authority to generate and produce at some place in Ontario power or energy, and to transform, transmit and distribute it. This would, I think, render meaningless the provision contained in s. 23 requiring the appellant to report to the Lieutenant-Governor in Council designating the land which, in the opinion of the appellant, should be expropriated, and also render unnecessary subs. 1 of s. 24 and clause *a* of subs. 2 of s. 24. I think that where the statute has explicitly provided for the exercise of the power of expropriation of land as is provided in subs. 1 of s. 24 and in clause *a* of subs. 2 of the same section, subs. 3, in conferring power upon the appellant expressed to be in addition to the powers conferred by The Power Commission Act, does not mean some other power to expropriate land, because the Act itself provides for that power. Effect can be given to subs. 3 of s. 24 by limiting it to other powers conferred upon the Minister of Public Works under The Public Works Act and to powers which are additional to but not inclusive of the expropriating power itself. Furthermore, the power of expropriation conferred upon the Minister of Public Works by s. 13 of The Public Works Act is not appropriate to the purposes of the appellant. It is, in its terms, a power to expropriate land for the public purposes of Ontario or for the use or purposes of any Department of the Government of Ontario. The purposes of the appellant are neither the public purposes of Ontario nor the purposes of any Department of the Government of Ontario.

Counsel for the appellant contended that all the Lieutenant-Governor in Council need do is to authorize the expropriation of the power-site or plant, the generation and production there of power and the transformation, conduct, storing, transmission and distribution of such power. The order-in-council in the instant case authorizes all these things. These things being authorized in this general way by the Lieutenant-Governor in Council, counsel for the appellant argues that such matters come within the language of subs. 3 as being matters authorized by the Lieutenant-Governor in Council under s. 24, and therefore the appellant has, in addition to the expropriating power provided for by s. 24, the power to expropriate land for the purposes of the appellant under s. 13 of The Public Works Act. I am unable to agree with that contention.

It follows from the foregoing that, the appellant having filed its plan and description in accordance with the provisions of The Public Works Act without the power so to do, and not having obtained power to expropriate the lands of the respondents by any order-in-council passed under s. 24 of The Power Commission Act, the lands of the respondents have not been lawfully expropriated by the appellant. The declaration made by the learned judge in Weekly Court to the effect that no part of the lands of the respondents has become vested in the appellant by the proceedings taken by the appellant should be affirmed. I think also that the notice of expropriation given by the appellant to the respondents, dated 4th June 1952, should be declared null and void. Counsel for the appellant conceding that the appellant did not file any plan and description within the meaning of s. 32, which will be later referred to, the registration of the plan and description in the registry office should be vacated.

It remains to consider whether that part of the judgment appealed from granting an injunction and damages should stand. The injunction restrains the appellant from entering upon the lands of the respondents. This involves consideration of the powers of the appellant to enter upon lands under s. 32 of The Power Commission Act.

Section 32(1) provides that notwithstanding anything in The Power Commission Act or any other Act, whenever the appellant has been authorized by the Lieutenant-Governor in Council to exercise any of the powers set out in clause *g* of s. 24(2), it may

proceed under the provisions set forth in s. 32. Under that section power<sup>\*</sup> is given to the appellant, without notice and without the deposit of any plan or description or any prerequisite or preliminary action or formality, and with or without the consent of the owner, to enter upon, take possession of and use for such time as the appellant may deem desirable any land which the appellant may deem to be required for the due exercise of the power so authorized. The section goes on to provide for compensation to the owner for the land taken or used and for all damage to property resulting from the exercise of such powers, and provision is made for determining the amount of such compensation. Subsection 11 of s. 32 provides for acquisition of title by conveyance after payment of compensation or by filing a plan and description of the land, right or easement taken. On the filing of such plan and description the land, right or easement taken becomes vested in the appellant. As stated earlier counsel for the appellant stated in argument before this Court that no plan or description was filed in relation to the respondents' lands under the provisions of s. 32.

It will be seen that the power to enter under s. 32 is dependent upon the appellant having been authorized by the Lieutenant-Governor in Council to exercise any of the powers set out in clause *g* of s. 24(2), and the power to enter under s. 32 is limited to the due exercise of the powers so authorized by the Lieutenant-Governor in Council. We must, therefore, consider what power the appellant is seeking to exercise in respect of the respondents' lands and whether such power is conferred upon the appellant under clause *g*.

The affidavit of Mr. Kewin filed on behalf of the appellant shows that the lands of the respondents are required for the purpose of constructing a transmission-line. The notice of expropriation shows that the lands of the respondents are to be used by the appellant for the construction, maintenance and operation of works. The order-in-council does not confer upon the appellant the power to construct the works mentioned in the first part of clause *g*. It does, however, confer upon the appellant the power to construct, maintain and operate works, including transmission-lines, for the purpose of generating, producing, transforming and transmitting power produced at its plant at Ashbridge's Bay. This power of construction and maintenance



is conferred by clause *b* of the order-in-council, being the powers set forth in clause *d* of s. 24(2). The appellant cannot invoke the procedure set forth in s. 32 in order to exercise the powers of construction of works conferred on the appellant by clause *d* of s. 24(2). I am, therefore, of the opinion that in this case the appellant is not, in relation to the lands of the respondents, exercising a power under clause *g*, and that s. 32 does not apply. To hold otherwise would mean that the appellant could invoke the procedure set forth in s. 32 to exercise the powers conferred under clauses *c* and *d* of s. 24(2), whereas s. 32 is expressly limited to the powers set out in clause *g*. It follows that the entry of the appellant upon the lands of the respondents was without lawful authority.

The appeal will therefore be dismissed with costs, but the judgment of McLennan J. should be varied so as to make it clear that the injunction granted thereby is not to prevent the appellant from entering on the lands of the respondents if and when it obtains the requisite authority so to do.

*Appeal dismissed with costs, subject to a variation.*

*Solicitors for the plaintiffs, respondents: Mason, Foulds, Arnup, Walter & Weir, Toronto.*

*Solicitors for the defendant, appellant: Zimmerman, Blackwell & Haywood, Toronto.*

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## [COURT OF APPEAL.]

**Re Hommel Estate; Hommel v. The Treasurer of Ontario.**

*Succession Duties — Exemptions — Gifts — House Bought by Deceased but Title Taken in Name of Wife — The Succession Duty Act, R.S.O. 1950, c. 378, ss. 1(f), 4(1)(g), 5(c).*

Property was bought in the name of W, a married woman. The cash payment was made by W's husband, H, but the deed was to W and she gave the mortgage for the unpaid balance of the purchase-price. Further payments on the mortgage were all made by H, who also arranged and paid for substantial improvements to the property. On H's death the Treasurer of Ontario claimed succession duties on the property, contending that it was the subject-matter of a "disposition" within the meaning of s. 1(f) of The Succession Duty Act. *Held*, the claim for duties must fail. H had at no time any property-interest in the property that could pass from him to W. The only property that passed from him to her at the time of the purchase was the sum of \$3,000 provided for the cash payment, and this was the only "disposition" made at that time. There was nothing in the evidence from which it could be inferred that there had been an antecedent oral agreement between H and the vendor which constituted H the purchaser.

*Succession Duties — Exemptions — Non-commutable Annuities — Settlement of Insurance — Right to Call for Payments out of Principal — The Succession Duty Act, R.S.O. 1950, c. 378, s. 4(1)(i).*

A husband, H, settled policies of insurance on his wife, W, *inter vivos*, the terms of the settlement being that the proceeds of the policies were to remain on deposit with the insurance company at a fixed rate of interest, and W was to be entitled to receive the interest and in addition, if she desired, to call upon the company to pay her sufficient principal to make up \$5,000 in any one year.

*Held*, this provision in favour of W was exempt from succession duty to the extent of \$1,200 per annum, under s. 4(1)(i) of the Act. It was not necessary to decide whether the settlement provision constituted a non-commutable annuity within the meaning of the sub-clause, because it clearly did provide for payment of income and for periodic payments. The right to withdraw capital was periodic and non-cumulative, but it was a right to withdraw only up to a maximum of \$5,000 in each year until the fund was exhausted. What H paid for in his lifetime included the right of W to leave the principal sum with the insurance company on terms whereby the company would pay interest on the amount so retained. This being so, the income payments W received were provided and paid for by H in his lifetime.

Judgment of JUDSON J., *ante*, p. 64, affirmed.

AN APPEAL by the Treasurer of Ontario from the judgment of Judson J., *ante*, p. 64, [1953] 1 D.L.R. 536.

3rd June 1953. The appeal was heard by PICKUP C.J.O. and HOPE and F. G. MACKAY JJ.A.

*E. H. Silk, Q.C.*, for the appellant: It is true that there was no written agreement of sale when this property was bought, but the conveyance must have been made pursuant to some agreement. [F. G. MACKAY J.A.: Had the parties quarrelled and separated there would have been a presumption of advance-

ment, and it would have been held that this was the wife's property.] Perhaps that is so, but in fact Hommel continued to enjoy a benefit from this property from day to day, and there is clearly a "disposition" within s. 1(f) of The Succession Duty Act, R.S.O. 1950, c. 378, not exempted under s. 4(1)(g). Some meaning must be given to the words "directly or indirectly" in the definition. [PICKUP C.J.O.: Your big problem is to bring the case within the words "passing from the deceased".] I refer to Hanson's Death Duties, 9th ed. 1946, p. 80, where it is said that if A contracts to buy a house and directs that the conveyance be made to B, there is a gift of the house, complete when the conveyance is executed, until which time A remains the owner. [PICKUP C.J.O.: I should have thought that that rule applied only where there was an agreement of sale and the donor had an interest in the land.] There must have been an agreement between Hommel and the vendor; it might have been unenforceable by reason of The Statute of Frauds, R.S.O. 1950, c. 371. [HOPE J.A.: Your position is that while there was no evidence of an enforceable contract, nevertheless there must have been a contract, which was in fact performed?] Yes. That is the only way to explain the preparation and delivery of the deed. The property that passed to the wife was the real estate, not merely the down-payment. [PICKUP C.J.O.: Your argument might succeed if it had been personal property, such as a diamond bracelet, bought by the wife but paid for by the husband, but real property cannot be dealt with in that way. Do you agree that if the subject-matter of the disposition was only the \$3,000 paid as the cash payment, you have no case?] Yes, on this branch of the case.

In proceedings under s. 32 of The Succession Duty Act the onus is on the taxpayer to show that the Treasurer's assessment is erroneous: *Re Webster Estate*, [1949] O.W.N. 581, [1949] C.T.C. 263. [PICKUP C.J.O.: There is no doubt of that. When do you say that there was a disposition of the whole estate in "Whitehaven"?] When the conveyance was made. [PICKUP C.J.O.: But the wife assumed a mortgage of \$10,000.] That is true, but the husband paid it off.

As to the insurance policies, on the option as it stood, alone, this would clearly be a commutable payment. [PICKUP C.J.O.: The beneficiary had the right under Option A unless the insured



withheld that right in the settlement?] Yes. Mrs. Hommel can withdraw up to \$5,000 in any one year, but she need not withdraw anything. That is not a payment of a sum certain from year to year, nor is it a periodic payment. It is therefore outside the exception. The deceased did not pay for this income; he paid for \$100,000 insurance and the beneficiary is entitled to receive that. [PICKUP C.J.O.: Surely he paid both for the \$100,000 of insurance and for the beneficiary's right to have the proceeds held by the company at interest?] [HOPE J.A.: That was one of the options for which he was paying.] [F. G. MACKAY J.A.: He paid his premiums under the terms of the policy for the privilege of taking advantage of any of the terms.] So far as the income is concerned, I rest my whole case on the fact that it was not paid for by the deceased.

*T. Sheard, Q.C.*, for the widow, respondent [directed by the Court to argue only on the second branch of the appeal]: The power of commutation extends only to \$5,000, and this is clearly an annuity or periodic payment. The mere fact that we did not withdraw it does not change its character. It is clearly an annuity for life. The English tax cases are helpful, since there one is taxed on all annual payments, and there are a number of cases as to what constitutes an annual payment. It has been held that all that is necessary is the property of being recurrent. "Periodic" is a wider word than "annual": *Trustees of Cunard's Will v. Inland Revenue Commissioners*; *McPheeters v. Inland Revenue Commissioners*, [1946] 1 All E.R. 159 at 163; *Moss' Empires, Limited v. Inland Revenue Commissioners*, [1937] A.C. 785, [1937] 3 All E.R. 381.

This income was clearly paid for by the deceased. If the policy said the widow was to be paid \$5,000 each year it would surely be an annuity, although she would not have to take it. There is no difference in legal effect between being entitled to \$5,000 each year and being entitled to withdraw up to \$5,000. The Treasurer did not think there was any difference; in his assessment he assumed that we would withdraw the full \$5,000.

*E. H. Silk, Q.C.*, in reply.

*Cur. adv. vult.*

12th June 1953. The judgment of the Court was delivered by

PICKUP C.J.O.:—This is an appeal by the Treasurer of Ontario from the judgment of Judson J. pronounced in non-jury Court at

Milton. Two questions are involved, the first being whether succession duty is payable by reason of the death of the late Robert H. Hommel in respect of certain real property known as "Whitehaven". The second question is whether, in respect of certain insurance policies, the widow of the deceased is entitled to exemption to the extent of \$1,200 per annum under s. 4(1) of The Succession Duty Act, R.S.O. 1950, c. 378.

As to the real property known as "Whitehaven", there are no facts in dispute. The late Robert H. Hommel arranged for the purchase of the property in 1939. There was no written agreement for purchase and sale, but the transaction was carried out by a cash payment of \$3,000 and a mortgage given back to the vendor of \$10,000. The conveyance was made to Grace M. Hommel, the wife of Robert H. Hommel, and she gave back a mortgage representing the unpaid balance of purchase-money of \$10,000. Mr. Hommel did not join in that mortgage or assume any obligation for payment of the mortgage-moneys, but he made the \$3,000 cash payment. Later, substantial improvements were made to the property, and it is said that all of these improvements were undertaken, arranged and paid for by the deceased. The mortgage was paid off in the lifetime of Mr. Hommel and he provided the moneys. He died in 1949 and at his death his widow was the owner of the property, with the improvements and clear of encumbrance.

The Treasurer claims that the property is dutiable at the value thereof at date of death, as being a disposition of the lands made by Mr. Hommel in his lifetime in favour of his wife.

The learned trial judge held that what Mr. Hommel had transferred to his wife at the time of the purchase was not the real property but the cash payment of \$3,000. If the disposition made by Mr. Hommel in his lifetime was a disposition in the nature of a gift to his wife of the cash payment required at the time of purchase, plus the moneys provided by him for the improvements made during his lifetime, and the moneys provided by him for payment of the mortgage given back to the vendor, there would be no duty payable under The Succession Duty Act because all of these gifts were made more than five years before the death of Mr. Hommel, and therefore would not be subject to duty under the statute.

Counsel for the Treasurer contends, however, that Mr. Hommel, at the time of the purchase of "Whitehaven", made a disposition thereof in favour of his wife, within the meaning of the definition of "disposition" as it appears in s. 1(f) of The Succession Duty Act. By this sub-clause "disposition" means, *inter alia*,

"(i) any means whereby any property passes or is agreed to be passed, directly or indirectly, from the deceased during his lifetime to any person,

"(ii) any means whereby any person is benefited, directly or indirectly, by any act of the deceased during the lifetime of the deceased."

Counsel for the Treasurer argues that because Mr. Hommel made the arrangements for the purchase and paid the cash payment there must have been an agreement between him and the vendor whereby he became the purchaser, and that he, as purchaser, caused the property to be conveyed to his wife.

I have no hesitation in holding that at the time of the purchase no property-interest in "Whitehaven" passed from Mr. Hommel to his wife, within the meaning of para. f(i). He never at any time had any property-interest in "Whitehaven" which could pass *from him* to his wife by any means. I agree with the learned trial judge that the only property which passed from Mr. Hommel to his wife at the time of the purchase was the sum of \$3,000 which he provided to enable the purchase to be made.

Counsel for the Treasurer further contended that what Mr. Hommel did in arranging for the purchase, in providing for the conveyance to be made to his wife, in arranging for her to give back a mortgage for the balance of the purchase-money and himself making the \$3,000 cash payment were acts whereby his wife was benefited directly or indirectly within the meaning of sub-clause ii of s. 1(f). The acts of Mr. Hommel in arranging for this purchase constituted a benefit to the wife in the sense that they enabled her to become the purchaser of the property, but that, in my opinion, is not a disposition of "Whitehaven" within the meaning of para. f, or a disposition of any property or the conferring of any benefit, except the disposition of the money which Mr. Hommel provided for the purchase, or the benefit of that sum of money. I do not accept the argument of



counsel for the Treasurer, which was to the effect that it should be inferred from the fact of the completion of the transaction of purchase that there had been, prior to that time, an oral agreement between the vendor and Mr. Hommel which constituted Mr. Hommel the purchaser. No doubt, there was a meeting of minds among the vendor, Mr. Hommel and Mrs. Hommel, intended to result in a purchase of the property, but I think that any antecedent oral agreement to be inferred from the completion of the transaction must be an oral agreement whereby Mrs. Hommel and not Mr. Hommel would become the purchaser, with Mr. Hommel making the cash payment, Mrs. Hommel assuming the obligation of the mortgage and the vendor accepting a cash payment of \$3,000, with a mortgage back from Mrs. Hommel for the balance of the purchase-price.

Agreeing as I do with the learned trial judge that the disposition made by Mr. Hommel at the time of the purchase was a disposition of money, namely, the sum of \$3,000, and not a disposition of "Whitehaven", it is unnecessary to consider the second legal question dealt with by the learned trial judge in relation to "Whitehaven".

Counsel for the widow contended before the learned trial judge that even if what happened at the time of the purchase constituted a disposition by Mr. Hommel of "Whitehaven", the property would still not be dutiable because of the provisions of s. 4(1)(g) of the statute. That paragraph exempts from duty a disposition "where actual and *bona fide* enjoyment and possession of the property in respect of which the disposition is made, was immediately assumed by the person to whom the disposition is made and thenceforward retained to the entire exclusion of the deceased or of any benefit to him whether voluntary or by contract or otherwise", with a proviso which has no application here. As I hold that there was no disposition by Mr. Hommel of "Whitehaven", I express no opinion as to whether or not, on the facts of this case, actual and *bona fide* enjoyment and possession of that property was retained by Mrs. Hommel to the entire exclusion of Mr. Hommel or of any benefit to him during his lifetime, within the meaning of s. 4(1)(g).

As to the insurance policies, again there is no dispute about the facts. Mr. Hommel, in his lifetime, caused several insurance policies to be issued upon his life. These policies named his

wife as beneficiary, with a provision for a contingent beneficiary. Under these policies there was a right under option "A" to have the whole or any designated part of the net proceeds retained by the insurance company until the death of the last surviving beneficiary or contingent beneficiary, the company in the meantime to pay interest thereon monthly at a rate specified, the amount of the monthly payments being dependent upon the amount of principal moneys retained. This option "A" gave the person entitled as beneficiary the right, at any interest-payment date, to withdraw the principal amount retained, provided Mr. Hommel did not specifically withhold such right. A special clause was added to each of these policies which limited the privilege of surrender and commutation conferred upon Mrs. Hommel by option "A". By this special clause Mr. Hommel directed that settlement of the proceeds of the policies should be made in accordance with the provisions of option "A", with the privilege to Mrs. Hommel of withdrawing \$5,000 of the principal sum in any one year, such withdrawal being non-cumulative but continuing until the proceeds of the policies were exhausted. This sub-clause also gave Mrs. Hommel the privilege of changing to another option for stipulated monthly instalments after she attained the age of 65 years. It provided that the settlement therein directed should be made without the privilege of surrender or commutation, except as in the special clause expressly stipulated.

Sub-clause *i* of s. 4(1) of The Succession Duty Act provides that no duty shall be levied on "any non-commutable annuity, income or periodic payment effected in any manner other than by will or testamentary instrument and paid for by the deceased during his lifetime, and paid to or enjoyed by the wife or dependent father or mother or any dependent brother, sister or child of the deceased after the death of the deceased, to the extent of \$1,200 per annum with respect to any one person and to the extent of \$2,400 per annum in the aggregate". The learned trial judge held that the settlement provisions of these insurance policies brought them within the meaning of sub-clause *i* referred to, and that the widow was, therefore, entitled to the exemption by that clause provided to the extent of \$1,200 per annum.

Counsel for the Treasurer contends that the right given to Mrs. Hommel under these insurance policies to withdraw capital

is not a non-commutable annuity; that it is not income and not a periodic payment. He argues that the amount of capital which Mrs. Hommel is entitled to withdraw in any year is within her absolute discretion, up to \$5,000, and that therefore there is no annuity involved in the withdrawal of capital because the amount is not a sum certain. He argues that in order to constitute an annuity payable out of capital, not only must the amount be certain but the payments must also be a series of payments *de anno in annum*. This might be so if what the widow was entitled to under these policies were merely a right to payment out of capital, but that is not this case. The widow is first entitled to interest, which, in my opinion, is income within the meaning of sub-clause *i*, and in addition to or partly in substitution for that income, she is given a limited right to encroach upon capital, the effect of which would be to decrease the income payments.

I do not think that we need decide whether this settlement provision constitutes a non-commutable annuity within the meaning of the sub-clause or not, because I am of the opinion that it does provide for payment of income and periodic payments. The right to withdraw capital is periodic. It is non-cumulative, but it is a right to withdraw capital up to \$5,000 in each year until the fund is exhausted.

Counsel for the Treasurer contends, however, that the income payments, meaning thereby the payments of interest on the moneys held on deposit by the insurance company, although income, are not income within the meaning of sub-clause *i* because they were not paid for by the deceased during his lifetime. He argues that what Mr. Hommel paid for in his lifetime was the principal sum, and that the consideration for the interest payments is the leaving of the principal on deposit with the insurance company. I do not agree with this contention. In my opinion what Mr. Hommel paid for in his lifetime included the right of the beneficiary to leave the principal sum with the insurance company on terms whereby the insurance company would pay interest on the amount so retained. That being so, the income payments which the widow receives on the moneys which she permits to remain on deposit from time to time were provided and paid for by Mr. Hommel in his lifetime, and therefore come within the sub-clause.



I am therefore in agreement with the learned trial judge on both of the issues involved in this appeal, and would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitor for the appellant: W. D. Blair, Toronto.*

*Solicitors for the respondent: Johnston, Sheard & Johnston, Toronto.*

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[COURT OF APPEAL.]

Curtis et al. v. Lutes.

*Fires — Liability for Escape on to Neighbouring Lands — Sufficiency of prima facie Case of Negligence — Res ipsa loquitur — Effect of The Accidental Fires Act, R.S.O. 1950, c. 3 — Absolute Liability.*

The effect of The Accidental Fires Act is to impose on the occupier of land on which a fire is lighted, at the lowest, a duty to take all reasonable precautions to prevent the fire getting beyond his own premises and doing injury to others. *The City of Port Coquitlam v. Wilson et al.*, [1923] S.C.R. 235 at 244, applied.

In determining whether there has been negligence in the setting of a fire or in preventing its spread, the Court will consider the time and circumstances relating to its origin and continued existence, the state of the weather, the presence or absence of wind, the proximity of combustible matter, the likelihood that if there is a wind it may revive and help to spread a smouldering fire, and other matters that may serve as a criterion of the prudence of setting a fire in the circumstances. *Furlong v. Carroll* (1882), 7 O.A.R. 145 at 162, applied. The rule *res ipsa loquitur* applies in such a case. *The City of Port Coquitlam v. Wilson et al.*, *supra*, at p. 245, applied; *Martin v. Dibblee Construction Co. Ltd.*, [1935] O.W.N. 269, followed.

In addition, one who sets a fire which spreads to his neighbour's land and does damage may be held liable under the rule of absolute liability laid down in *Rylands et al. v. Fletcher* (1868), L.R. 3 H.L. 330, and *The Canada Southern Railway Company v. Phelps* (1884), 14 S.C.R. 132 at 144. *Furlong v. Carroll*, *supra*; *Jones v. The Festiniog Railway Company* (1868), L.R. 3 Q.B. 733; *Musgrove v. Pandelis*, [1919] 2 K.B. 43, applied.

AN APPEAL by the plaintiffs from a judgment of King J. dismissing the action.

5th June 1953. The appeal was heard by LAIDLAW, HOGG and J. K. MACKAY JJ.A.

*W. C. Grant*, for the plaintiffs, appellants.

*W. J. A. Fair, Q.C.*, for the defendant, respondent.

17th June 1953. The judgment of the Court was delivered by

HOGG J.A.:—This appeal is taken by the plaintiffs from the judgment pronounced on the 5th March 1953 by Mr. Justice King, sitting without a jury, whereby he dismissed the claim of

the appellants for damages alleged to have been caused to their property by fire which originated upon the respondent's premises and spread to those of the appellants.

The appellants pleaded negligence on the part of the respondent. The learned trial judge held that the respondent was not negligent in any respect. No reference is made in the record or in the reasons for judgment to the principle laid down in *Rylands et al. v. Fletcher* (1868), L.R. 3 H.L. 330.

The trial judge found that the fire which destroyed the property of the appellants originated on the premises of the respondent and was carried by the wind to the appellants' buildings.

No evidence was adduced by the respondent at the trial.

The facts are simple and those that are material are as follows:

The land of the respondent immediately adjoins that of the appellants. On the respondent's premises is carried on by him the business of preparing cedar posts for use by peeling the bark from such posts, and as an incident of such occupation the bark or some of it is destroyed by fire in a pit, which is referred to as a burning-pit, situated on the respondent's land. A number of cedar posts were piled on this land and as was stated by the learned trial judge: "There was a good deal of bark and peelings which was not burned in this pit but which remained on the surface of the post-yard at least in the vicinity of the pile of cedar posts."

John Curtis, one of the appellants, said that about 10 o'clock in the morning of the day on which the fire destroyed his property, he noticed fire arising from the burning-pit and that "the fire was coming from the pit towards our buildings then". Curtis was apparently in error as to the time when he first noticed the fire, for at that time, he said, it was not only burning in the pit but had spread to the piles of posts and the bark. According to the evidence of Mr. Francis Kennedy this was the state of the fire about noon and not at 10 o'clock. Another witness noticed smoke coming from the pit several days before the fire which caused the destruction of the appellants' buildings.

Mr. Kennedy happened to be passing the place in question at about noon on the day of the fire and said that at that time "the post-yard had taken fire", and that piles of posts and the ground

in the vicinity of the posts were burning. He also noticed that sparks were flying, on account of the velocity of the wind, towards the appellants' property and noticed that the roof of the appellants' house was on fire. This witness testified that he did not find water available on the respondent's premises.

There is evidence that the weather was dry on the day of the fire.

There is evidence that two men, presumably employees of the respondent, were present at the time of the fire, but there is no evidence of any acts on their part to prevent its spread to the appellants' premises.

The learned trial judge was of the opinion that the testimony of all the witnesses was to be accepted and that they endeavoured to tell the truth.

A rigorous rule in early days governed the responsibility of the occupier of premises upon which a fire had been lighted, for damages caused by such fire escaping. He could evade liability only if he could show that the fire had originated from the act of a stranger or an act of God: *The City of Port Coquitlam v. Wilson et al.*, [1923] S.C.R. 235 at 242, [1923] 2 D.L.R. 194, [1923] 1 W.W.R. 1025 per Duff J. (afterwards C.J.C.).

The law was modified by the statutes 6 Anne, c. 31, and 14 Geo. III, c. 78, which latter statute is substantially re-enacted in the present Accidental Fires Act, R.S.O. 1950, c. 3. This Act provides that no action shall be brought against any person in whose house or building or on whose lands any fire accidentally begins. In the *Port Coquitlam* case at p. 244 Duff J. said: "The effect of the statute . . . is to impose upon the occupier of premises in which a fire is lighted at the very lowest the duty to take all reasonable precautions to prevent the fire getting beyond his own premises and doing injury to others; and an obligation to take reasonable precautions in dealing with such a dangerous element as fire is an obligation to take special care."

The learned trial judge found that there was a causal connection between the fire on the respondent's premises and the damages to the appellants' property. He said, in his reasons for judgment: "I think that on the evidence there can be no doubt that the fire which started on the defendant's premises was carried to the west by the wind which was blowing in a westerly direction that morning and that the fire which occur-



red on the property occupied by the plaintiffs was caused in that manner.”

The trial judge, however, seems to have concluded that the fire which spread to the appellants' property did not have its origin in the burning-pit, although there is no evidence of fire having been started on any other part of the respondent's land. Possibly this opinion is based upon the testimony of Mr. Kennedy who said that when he first saw the fire about noon he thought it had “apparently started in the front end of the yard towards the north side”.

In *Trustees of Methodist Church v. Town of Welland* (1908), 12 O.W.R. 949, it was held by this Court that burning gas from a gas-main which had burst some 100 feet from the church, in the absence of any other reasonable cause, presented a reasonable explanation of the cause of the fire in the church building.

In the present case there is no evidence of a fire having been started anywhere on the respondent's premises other than in the burning-pit. No reasonable explanation has been presented of the cause of the fire which destroyed the appellants' property, other than that it originated in and escaped from this burning-pit, and from there spread throughout the respondent's premises and to the buildings of the appellants.

In the determination of the question of care or negligence on the part of the respondent, the time and circumstances relating to the origin and continued existence of the fire, the state of the weather, the presence of wind, the proximity of combustible matter, the likelihood that if there was wind it might have revived and helped to spread a smouldering fire, and have carried the fire in a direction where damage might be caused, must be considered, also, as was said by Patterson J.A. in *Furlong v. Carroll* (1882), 7 O.A.R. 145 at 162, “. . . other matters serving as criteria of the prudence of setting out fire at the particular time and in the particular spot have properly entered into the investigation”.

In the present case there is the uncontradicted evidence—in fact it is pleaded in the statement of defence—that the respondent was accustomed to burn bark from cedar posts in a pit on his premises, and there is evidence that fire was seen in this pit several days before the mishap. There is evidence that combustible material consisting of cedar-bark lay in considerable

quantities on the respondent's land, as well as piles of cedar posts; there is the evidence that the weather was dry and that a wind was blowing towards the appellants' buildings on the day of the fire, carrying sparks in that direction. There is also the evidence of Mr. Kennedy that fire was burning along the ground as well as in the piles of posts, and there is his evidence of lack of water on the respondent's premises, also that the fire appeared to start on the roof of the appellants' house from sparks carried by the wind.

I am of the opinion that the circumstances I have outlined, if they do not show actual negligence on the part of the respondent, are such as to raise an inference of want of care and throw on the respondent the onus to acquit himself of responsibility, in other words, that, the appellants having made a *prima facie* case of want of care, the burden is cast upon the respondent for an explanation.

It is to be gathered from the language of Duff J. in the *Port Coquitlam* case at p. 245 that the rule of *res ipsa loquitur* may be invoked in a case such as that now under consideration. That this rule is applicable is clearly stated in *Martin v. Dibblee Construction Co. Ltd.*, [1935] O.W.N. 269, in this Court. There a fire started from the use of an acetylene torch and it was held that there was want of care shown on the part of the operator of the torch. Fisher J.A., with whom Riddell J.A. concurred, said that the maxim *res ipsa loquitur* applied.

No explanation has been furnished by the respondent.

I am of the opinion that the respondent must be held to have shown want of care under the circumstances established by the evidence and must therefore be held to be liable for the damage caused by the fire.

There is in addition a liability cast upon the respondent which does not arise because of any negligence on his part. The rule laid down in *Rylands et al. v. Fletcher*, *supra*, is applicable to this case. It is set out in clear and simple language by Strong J. in the Supreme Court of Canada in *The Canada Southern Railway Company v. Phelps* (1884), 14 S.C.R. 132 at 144:

"At common law a person who brings or originates on his land any dangerous element, such as fire or an accumulation of water, or any other thing which if it should escape may damage

his neighbour, does so at his peril, negligence being in such cases entirely immaterial."

In that case a fire had been caused by sparks from a locomotive.

In *Furlong v. Carroll*, *supra*, the judgment of the Court of Queen's Bench in *Jones v. The Festiniog Railway Company* (1868), L.R. 3 Q.B. 733, was followed. In that case a fire was caused by a spark from an engine being blown onto the plaintiff's haystack. Blackburn J. held that the defendant company was liable under the rule in *Rylands et al. v. Fletcher*.

In *Musgrove v. Pandelis*, [1919] 2 K.B. 43, a fire started in the carburetor of a motor car situated in a garage, spread to the car and the garage and to the property of the plaintiff. It was held that the fire was not accidental and that there was want of care on the part of the chauffeur who started the engine of the motor car. It was held that the rule in *Rylands et al. v. Fletcher* also imposed liability upon the defendant, the owner of the motor car. It was furthermore held that the protection of the statute, which did not apply to a fire caused either deliberately or negligently, did not apply where liability existed under the rule in *Rylands et al. v. Fletcher*.

The facts of this appeal do not bring it within the rule of law applied in this Province where fire is used for a necessary purpose of husbandry such as clearing land so that it may be put in such condition that it may be cultivated. If a fire is started and used for this purpose, it must be established, in order to impose on the person starting the fire liability for damage by the fire to the property of others, that because of the state of the weather or wind or other exceptional circumstance, the act of lighting such fire was one which a reasonable or prudent man would not have done. In such a case the rule in *Rylands et al. v. Fletcher*, *supra*, does not apply: *Dean v. McCarty* (1846), 2 U.C.Q.B. 448; *Murphy v. Dalton* (1884), 5 O.R. 541; *Forbes v. Daw*; *McGregor v. Daw* (1920), 19 O.W.N. 262.

The case now before the Court is not one to which the special rule above mentioned applies.

For the reasons I have given, it is my opinion that the judgment of the learned trial judge must be set aside, and judgment pronounced awarding the appellants the amount of damages



found for each of them by the trial judge. The costs of the action and of the appeal should be to the appellants.

*Appeal allowed and judgment directed for plaintiffs,  
with costs throughout.*

*Solicitor for the plaintiffs, appellants: William C. Grant,  
Peterborough.*

*Solicitor for the defendant, respondent: W. J. Arthur Fair,  
Peterborough.*

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[COURT OF APPEAL.]

Hooper v. Hooper.

*Real Property — Land Titles — Effect of Unregistered Transfer —  
What Constitutes Delivery — Transfer from Husband to Husband  
and Wife jointly — The Land Titles Act, R.S.O. 1950, c. 197, ss. 37,  
70, 71(1), 104.*

While the system set up under The Land Titles Act is one of registration of title rather than of deeds, execution and delivery of a transfer in the prescribed form, particularly when it is accompanied by the affidavits required for registration, confers on the transferee a title in equity, and that title is good for all purposes except as against some other title that may obtain priority by being recorded. Upon registration and completion of the transfer on the register the transferee becomes fully protected against any other transfer. *Abigail v. Lapin et al.*, [1934] A.C. 491 at 500, applied; *Macedo et al. v. Stroud*, [1922] 2 A.C. 330, distinguished. A transfer from the registered owner to himself and another person jointly is sufficiently delivered by the placing of it, with the knowledge of both parties, in their common possession.

The effect of s. 104 is to give to a transfer, duly executed, the same effect, for all purposes, as if it were made under seal, and consequently the delivery required to make the transfer effective is the delivery ordinarily required in the case of a deed. *Macedo et al. v. Stroud*, *supra*, at pp. 334, 337, applied. The words "registered under this Act" in s. 104 modify the word "land" rather than the words "charge or transfer", so that the section refers, not to a transfer registered under the Act, but to a transfer of *land* registered under it.

AN APPEAL by the plaintiff from the judgment of Smily J. dismissing the action.

5th June 1953. The appeal was heard by PICKUP C.J.O. and HOPE and F. G. MACKEY JJ.A.

*C. L. Dubin, Q.C.* (*A. F. Rodger*, with him), for the plaintiff, appellant: I accept the findings of fact of the learned trial judge, but quarrel with his conclusion that the gift was incomplete because there was no delivery. After this transfer was given to the plaintiff she put it in a box used by both parties for keeping valuables. In the case of a deed all one needs is

execution and intention; there need not be physical delivery, as in the case of a chattel.

The failure to register the transfer does not affect the position of the parties to it, and the defendant has no right to deal with the land contrary to the terms of the transfer. A third person would of course take good title if he registered a transfer, provided it was for valuable consideration and he was in good faith. The trial judge having found that when the defendant executed the conveyance he intended that the parties should thereafter own the property jointly, no further handing over of the document was necessary: *The Land Titles Act*, R.S.O. 1950, c. 197, ss. 37, 70, 71; *Magee on Land Titles*, 1940, p. 59; *Guest v. Cochlin*, 64 O.L.R. 165, [1929] 3 D.L.R. 790; *Abigail v. Lapin et al.*, [1934] A.C. 491. [PICKUP C.J.O.: Section 37 does not make the transferor the owner until registration, it merely says that he is deemed to be the owner.] Yes. The decision in *Macedo et al. v. Stroud*, [1922] 2 A.C. 330, is distinguishable, because of the provision in the statute there under consideration (set out in a note at p. 332 of the report) that no instrument should be effective to pass any estate until registration. There is no such provision in our Act.

Although the transfer was not under seal, s. 104 of *The Land Titles Act* gives it the same effect for all purposes as if it were executed under seal, provided the land with which it deals is registered under the Act.

Once a deed is executed, all that is required to complete the transaction is that the party whose deed it is expressed to be shall by words or conduct expressly or impliedly acknowledge his intention to be bound by its terms: 10 Halsbury, 2nd ed. 1933, p. 197. [PICKUP C.J.O.: What acts or words do you rely on in this connection?] Evidence that this was to be a birthday and anniversary gift, and the husband's statements to other persons that the property was to be jointly owned. [HOPE J.A.: You have a strong finding of fact in your favour in that connection.] Yes. The deed itself is evidence that the defendant intended to be bound by it.

In the alternative, if physical delivery of the transfer was required, the depositing of the document in the box used by both parties, in which both of them kept their own documents, and to which both of them had access, constitutes delivery. The trans-

fer here being to the husband and wife as joint tenants, the normal place to keep such a document would be in such a receptacle, and it was in their joint possession when placed there. On many occasions the wife appears to have had physical possession of the transfer.

*H. F. Parkinson, Q.C.*, for the defendant, respondent: The Land Titles Act sets up a system of registration of titles rather than of deeds. I concede that a delivered land-transfer document creates an equitable right, but it does not pass title. [PICKUP C.J.O.: Is it your submission that a transfer is nothing more than authority to the Master of Titles to transfer the title?] Yes. Section 104 of the Act, when it refers to a transfer, is not speaking of the document, but is providing that a transfer of title may be made by a document or instrument not under seal. The words "signed, sealed and delivered" are not used in a transfer under The Land Titles Act, and therefore an instrument of transfer has not the attributes of a deed until it is registered. [PICKUP C.J.O.: You are arguing that the words "registered under this Act" apply to and modify the word "transfer" rather than the word "land"?] Yes. The document in the hands of a transferee vests the equitable title in him and gives him a statutory right to be registered as owner. [F. G. MACKAY J.A.: If the plaintiff had an equitable interest in one-half of the land could she not compel registration?] Yes, if there had been proper delivery. I refer to *Milroy v. Lord* (1862), 4 DeG. F. & J. 264, 45 E.R. 1185.

*C. L. Dubin, Q.C.*, in reply: *Guest v. Cochlin, supra*, is direct authority that registration is not necessary as between the parties.

*Cur. adv. vult.*

18th June 1953. The judgment of the Court was delivered by

PICKUP C.J.O.: This is an appeal by the plaintiff from the judgment of Smily J. pronounced on the 10th December 1952, in an action tried at Toronto without a jury.

In her action the appellant relied upon a transfer dated 7th August 1945 from the respondent to the appellant and respondent jointly of lands registered in the land titles office at Toronto, being premises known as 20 Ellis Park Road, in the village of Swansea. In her statement of claim she asked that the respondent be required to produce the transfer for registration or, in



the alternative, for a declaration that the appellant and respondent were the owners in fee simple, with an absolute title, as joint tenants, to the lands. She also asked for sale or partition with an accounting of rents and profits since 17th July 1951.

The respondent in his defence disputed appellant's claim and counterclaimed for a declaration that he was the beneficial owner of two other adjoining parcels of land, being parcels 7071 and 9403 in the register for the west section of the township of York.

The learned trial judge dismissed the appellant's action, but allowed the counterclaim in part, by adjudging that the two last-mentioned parcels of land were vested in the appellant and respondent, as to each of them for an undivided one-half interest therein.

The appellant accepts the findings of fact made by the learned trial judge.

The property known as 20 Ellis Park Road, to which I shall refer as "the house property", was purchased by the respondent and registered in the land titles office in his name in October 1944. In August 1945 the respondent signed a transfer of the house property from himself to the appellant and the respondent jointly. On that date the respondent completed the necessary affidavit required under The Land Titles Act, now R.S.O. 1950, c. 197, showing that he was of the full age of 21 years. At the same time wills were prepared by each of the parties and all of these documents were left with the solicitor for the parties. In December 1945 the affidavit of execution required under The Land Titles Act was completed by the witness, as was also the affidavit necessary under The Land Transfer Tax Act, now R.S.O. 1950, c. 198. The transfer was then, in form, complete so that it could be registered in the land titles office. These documents were later sent by the solicitor to the respondent and the transfer was placed by the parties, or one of them, but with the knowledge and consent of both, in a box in their residence, used by both of them. The learned trial judge finds that it was the intention of the parties that this transfer should put the property in the joint names of both parties.

In this same box, to which both parties appear to have had access at all times, were also kept the transfers of two other properties adjoining the house property. These properties were

purchased either by the respondent or by the appellant on the direction of the respondent, and title was taken in the name of the appellant alone. One of these properties was a lot which was purchased as being necessary to have it as part of the house property, for the reason that the house itself was built into a hill. The other lot was acquired because it had been used by the people next door to deposit their garbage, and it was undesirable to have that situation so close. The learned trial judge found that it was the intention of the parties that these two adjoining properties should be owned by both parties as common property, in their joint names, and to that finding he gave effect by his judgment.

As to the house property the respondent claimed that he had not intended the transfer to be registered, or to take effect until his death, and that it was subject to recall. As to this, the learned trial judge thought that the respondent did not intend that the transfer should be registered, but rejected his evidence as to the transfer being intended only to be effective at death, or to be subject to recall. On the contrary the learned trial judge found that the respondent did intend that this property should be held by himself and the appellant jointly as carrying out their idea that their property would be held in common, with the thought that it was not necessary to register the transfer.

Notwithstanding that he found the intention of the parties to be as above stated, the learned trial judge came to the conclusion that the transaction was one of gift, that the gift was not completed for want of registration of the transfer, and that since it was an uncompleted gift, the intention of the parties was not carried out and could not be given effect to.

Counsel for the respondent relies upon the provisions of The Land Titles Act. He contends that the land titles system is a system for registration of title and not of deeds; that the transfer is merely the authority to transfer title and is not effective to pass any title, either in law or in equity, until registered; that until registered it has not the legal effect of a deed, and the legal principles applicable to delivery of deeds do not apply to such a transfer. He refers particularly to ss. 14(1), 29(1), (2), (4), 37, 53, 71(1) and 104 of the Act.

I do not think I need discuss s. 14 or s. 29.

Section 37 provides that every registered owner may, in the prescribed manner, transfer the land or any part thereof, and that the transfer shall be completed by the proper master of titles entering the transferee on the register as owner of the land transferred, and until such entry is made the transferor shall be deemed to remain owner of the land. The prescribed manner for transfer referred to in s. 37 is provided for by regulations made under The Land Titles Act, being Regns. 237 (C.R.O. 1950, vol. 2, p. 161), and particularly no. 31 thereof. This regulation simply deals with the form of the transfer and the affidavits required for registration thereof, and was fully complied with.

Section 53 need not be discussed. It deals only with transfers of charges and need not be referred to.

Section 70 should be referred to. Subsection 1 thereof provides that no person other than the registered owner shall be entitled to transfer or charge registered freehold or leasehold land by a registered disposition; subs. 2 recognizes the right to create unregistered estates or interests in the land, and subs. 3 provides how such unregistered estates or interests may be protected.

Section 71(1) provides that: "Every transfer or charge signed by a registered owner . . . shall, until cut out by a conflicting registration, confer upon the person intended to take under such transfer or charge a right to be registered as the owner of such land or charge."

Section 104, which appears under the heading "INSTRUMENTS NEED NOT BE SEALED", reads as follows: "Notwithstanding any statute or any rule of law, any charge or transfer of land registered under this Act may be duly made by an instrument not under seal, and if so made the instrument and every agreement, stipulation and condition therein shall have the same effect for all purposes as if it were made under seal."

I am of the opinion that the sections of The Land Titles Act referred to have not the effect contended for by counsel for the respondent. While the system may be said to be a system for registration of title, not of deeds, execution and delivery of the instrument of transfer in the prescribed form, particularly when accompanied by the affidavits requisite for registration, confers a title in equity until registration, and I think that such title is



good for all purposes except as against some other title which may obtain priority by being recorded in the land titles office. Upon registration and completion of the transfer on the register, the transferee becomes fully protected against some other transfer which might, by prior registration, obtain priority and legal effect: *Abigail v. Lapin et al.*, [1934] A.C. 491 at 500.

Counsel for the respondent relies upon the decision in *Macedo et al. v. Stroud*, [1922] 2 A.C. 330. In that case a memorandum of transfer had been signed. It had not been registered, or handed to the transferee for that purpose, and it was held, having regard to the terms of an ordinance of Trinidad, that it transferred no estate or interest either at law or in equity, but at most amounted to an incomplete instrument which was not binding for want of consideration. The ordinance of Trinidad which was considered in that case expressly provided that no instrument, until registered in the manner prescribed, should be effectual to pass any estate or interest in the land. There is no such provision in The Land Titles Act. The two statutes are, in my opinion, quite different, and I do not regard the *Macedo* case as authority for the proposition that the transfer in question in the instant case had no legal effect until registration.

It is contended, however, on behalf of the respondent that in any event this transfer of the house property could not have any legal effect as a gift unless the document was actually delivered to the appellant. In my opinion, on the facts of this case, there was delivery of that document by the placing of it, with the knowledge of both parties, in their common possession. It was intended to be a transfer to them jointly, and I would consider that the actual placing of it in their joint possession would be the appropriate way to effect delivery of the document. Even if this were not so, I am of the opinion that there was, in this case, delivery such as is required in the case of a deed. In my opinion, the effect of s. 104 of The Land Titles Act above referred to is to give the transfer in question the same effect, for all purposes, as if it were made under seal.

Counsel for the respondent argues, however, that the true construction of s. 104 is that it is only a registered instrument of transfer that is given the same effect as if it were made under seal. I think the correct meaning of the section is that it is not

referring to a *transfer* registered under the Act, but is referring to a transfer of *land* registered under the Act.

I think also the *Macedo* case above referred to supports the view that the delivery required to make the transfer in question effective as between the parties is the delivery which is ordinarily required in the case of a deed. I have already referred to that case with reference to land registered under the Real Property Ordinance, but the case also involved land which was not registered under that ordinance. The local ordinance under consideration did not require a seal, but principles relating to delivery of a deed were applied thereto.

Viscount Haldane said at p. 334: "Most of the property was governed, as regarded the mode of conveyance, by the general law under which freehold and leasehold property is assured in Trinidad by deed, like land in England, although in Trinidad such deeds require only signature and delivery but not sealing. Registration under the local ordinance is not required in the case of such property so far as concerns the validity of the deed, although non-registration may postpone title to that conferred by a registered assurance."

And at p. 337 he said: "Their Lordships entertain no doubt that the conveyance of the unregistered property was a deed which was duly delivered. As was said by Blackburn J. in *Xenos v. Wickham*, L.R. 2 H.L. 296, 312, no particular technical form of words or acts is necessary to render an instrument the deed of the party who has executed it. For as soon as there are acts or words showing that it is intended to be executed as his deed that is sufficient. The usual way of showing this is formal delivery: 'but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. . . .'"

In the instant case I think there was abundant evidence of words and acts that sufficiently show that the transfer in question was finally executed and that, in my opinion, was all that was necessary.

I would, therefore, allow the appeal with costs, and direct judgment to be entered in favour of the appellant, ordering the respondent to produce and file in the land titles office at Toronto the original transfer in question, or, if that cannot be done, there will be a declaration that the appellant and respondent are the owners in fee simple with an absolute title as joint

tenants of the house property referred to. It follows that there should also be an order for partition or sale with an accounting by the respondent to the appellant as asked for in the statement of claim. If necessary, a judge of this Court may be spoken to on settlement of the order. The appellant should have her costs of the action.

*Appeal allowed and judgment directed for plaintiff,  
with costs throughout.*

*Solicitors for the plaintiff, appellant: Frame, Rodger and Rose, Toronto.*

*Solicitor for the defendant, respondent: William C. Davidson, Toronto.*

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[COURT OF APPEAL.]

**Regina v. Kowbel.**

*Criminal law — Conspiracy — Necessity for at least Two Parties to Agreement — Whether Husband and Wife Alone Can Commit Offence — The Criminal Code, R.S.C. 1927, c. 36, ss. 2(13), 10, 16, 20, 21, 573.*

A criminal conspiracy can now, under the present state of the law, be formed by a husband and wife alone, and the old rule of the common law that a husband cannot be convicted of conspiracy with his wife alone, and a wife cannot be convicted of conspiracy with her husband alone, is no longer the law of Ontario. The common law theory of "unity" of spouses was not applicable for all purposes, and in many cases a married woman could be convicted of crimes committed by her alone. The theory that she could not conspire with her husband was based upon her incapacity to contract, and since that incapacity is now abolished there is no room for the application of the common law doctrine. Further, the exemption from liability is inconsistent with provisions of The Criminal Code, and has therefore been abrogated by those provisions.

*Per Hogg J.A., dissenting:* Under s. 16 of The Criminal Code all principles of the common law affording a defence to any charge remain in force unless abolished or altered. The rule at common law that a husband and wife cannot be convicted of conspiracy with each other alone has not been abolished by the Code, and this common law defence can be taken away from an accused only by legislation of the Parliament of Canada.

AN APPEAL by an accused from his conviction, by a magistrate at Toronto, of conspiracy.

10th June 1953. The appeal was heard by LAIDLAW, HOGG and J. K. MACKAY JJ.A.

*F. L. O'Donnell*, for the accused, appellant: A man and his wife, being one person in law, cannot be convicted of conspiring together, since at least two parties are necessary. [LAIDLAW



J.A.: Should the Courts still adhere to that fiction, when we know that it is no longer true?] It was more than a fiction, and although it had been altered in some respects that alteration is limited, and provincial statutes cannot affect criminal law or criminal liability.

The old law is stated in Russell on Crime, 10th ed. 1950, p. 1802 (vol. 2), citing *Regina v. Whitehouse et al.* (1852), 6 Cox C.C. 38. Any change in this law can be made only by Parliament.

The question was considered in *Rex v. McKeachie*, [1926] N.Z.L.R. 1, and it was there held that the common law rule still applied and was not changed by the New Zealand Criminal Code, which in this respect is the same as The Criminal Code, R.S.C. 1927, c. 36. It was also discussed in *The Director of Public Prosecutions v. Blady*, [1912] 2 K.B. 89. All the text-writers seem to be of the opinion that the law is unchanged, although some of them think it should be altered.

The common law rule was not based on the doctrine of marital coercion, but on the doctrine of unity of spouses, and consequently s. 21 of the Code, abolishing the presumption of coercion, does not affect the rule.

W. C. Bowman, Q.C., for the Attorney-General, respondent: If there ever was such a rule as is stated in the texts it was abrogated by s. 21 of The Criminal Code. The doctrine of unity must be based on the theory that man and wife had only one will. It cannot have been the theory of the common law that they were in reality one person. The theory, being thus in effect that of coercion by the husband, has been abolished by s. 21.

I concede that both Halsbury and Kenny's Outlines of Criminal Law, 16th ed. 1952, state the common law rule as the present law.

*Rex v. McKeachie*, *supra*, was the decision of only a bare majority, and should not be followed. I submit that the dissenting judgment of the Chief Justice in that case correctly states the law, and should be followed.

Hawkins's Pleas of the Crown, 1824 ed., vol. 1, p. 448, says that the basis of the rule is that husband and wife "are esteemed but one person and are presumed to have but one will". This shows that the rule is a mere extension of the defence of coercion.

*F. L. O'Donnell*, in reply: The common law rule was not based on the doctrine of coercion, but on the theory of unity, which first arose in connection with benefit of clergy. If the rule were based on a presumption of coercion, there could be no conspiracy between master and servant, when the servant was under the domination of the master.

In *Rex v. Peel*, *The Times*, 8th March 1922, the Solicitor-General referred to the common law rule as still in existence, and Darling J. agreed. This shows that the acquisition of property-rights and other rights by married women has not affected the common law rule as to conspiracy. There are other illustrations of the common law theory of unity, as in the rule that a married woman's domicile can only be that of her husband.

Further text-book references are: Lush on Husband and Wife, 4th ed. 1933, p. 596; 9 Halsbury, 2nd ed. 1933, p. 48; Warburton, *Leading Cases on Criminal Law*, 6th ed. 1932, p. 136; Stephen's *Commentaries on the Laws of England*, 21st ed. 1950, vol. 4, p. 165.

*Cur. adv. vult.*

23rd June 1953. LAIDLAW J.A.:—I have had the privilege and the great benefit of perusing the reasons for judgment prepared with much study and care by my brother Hogg, but, with much respect, I disagree with the opinion expressed by him.

There can be no doubt that at common law a husband could not conspire with his wife and a wife could not conspire with her husband. Spouses could not be convicted of conspiracy between themselves. That law has been stated and restated in different words and many times by learned authors. The source of authority appears to be Hawkins's *Pleas of the Crown*, Book 1, c. 27, s. 8, where it is stated:

"It plainly appears from the words of the statute that one person alone cannot be guilty of conspiracy within the purport of it; from whence it follows that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest is the acquittal of that one also. Also upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will."

The case referred to in support of that statement of law is in the Year Books of 38 Edward III and was decided in 1365. The basis of the law, as appears from the passage quoted, was that at common law the husband and wife became, by marriage, one person. Freedom of spouses from liability for the commission by them of the offence of conspiracy was founded upon the theory of unity of married persons and because, in the eyes of the law, a married woman had no legal existence, there could not be conspiracy between her and her husband.

But that common law theory of union of married persons requires careful examination. A man and his wife were not regarded as one person in every case and in all circumstances. In many cases the wife could be prosecuted and convicted as a separate person for offences against the criminal law. She was fully responsible for crimes which she committed alone and voluntarily or which she incited or procured her husband to commit: Eversley on Domestic Relations, 6th ed. 1951, p. 149, referring to "4 Bl. Comm. 29, 1 Hale 516; 2 Hawk. P.C. c. 29, s. 24"; also 1 Hawk. P.C. c. 1, s. 12; *Regina v. Buncombe* (1845), 1 Cox C.C. 183. Thus where a woman was tried for uttering a forged order and it appeared that, although her husband had ordered her to do it, he was not present when she did it, the judges upon a case reserved held that the presumption of coercion did not exist as the husband was absent at the time of the uttering and that the wife was properly convicted of the uttering and the husband of procuring: *Rex v. Morris and Morris* (1814), Russ. & Ry. 270, 168 E.R. 797, and *Regina v. Baines* (1900), 19 Cox C.C. 524, referred to in Crankshaw's Criminal Code, 6th ed. 1935, p. 36.

I do not refer to other cases in which a married woman has been held responsible at common law for her criminal acts. In my opinion the reason she could not be guilty of conspiracy with her husband and he could not be guilty of committing that offence with her is that at common law a married woman had no capacity to contract with another person. She was incapable of making an agreement with her husband and because the very essence of the crime of conspiracy is an agreement between alleged conspirators it was not possible for the spouses to commit that offence. If that disability on her part had not existed and the wife had been free to enter into an agreement with her husband, the law would not have regarded them as one person on a



charge of conspiracy, but as separate persons, each responsible for his or her wrongful act. It follows, in my opinion, that when the incapacity of a married woman to contract with her husband was removed by law and she was given her freedom to exercise her own will and enter into an agreement, whether for a lawful or an unlawful purpose, she thereupon became subject to the criminal law respecting conspiracy and became liable for committing that offence.

A married woman in this Province is not under any disability to contract with her husband and they may make an agreement with each other in the same manner and for the same purposes as though they were separate persons. They can enter into a partnership agreement; they can grant things to each other and enter into covenants one with the other; they have separate legal existence for all such purposes: *Gibson v. Le Temps Publication Co.* (1904), 8 O.L.R. 707 at 708, cited with approval in *Faye v. Roumegous* (1918), 42 O.L.R. 435 at 446, 42 D.L.R. 533; see also The Married Women's Property Act, R.S.O. 1950, c. 223, ss. 2 and 3. Likewise, in this Province there is no incapacity of a married woman preventing her from entering into an agreement with her husband for an unlawful purpose, which, as I have stated, is the gist of conspiracy. Neither spouse can escape liability for that offence on the ground that there was no agreement between them because of incapacity in law of the wife to enter into a contract. If such an agreement existed between them as separate persons, then there is no room for the application of the common law theory of unity of person.

Apart from what I have said as to the basis upon which a husband and wife were free at common law from liability for conspiracy with one another, there appears to me good reason to find from the provisions of The Criminal Code, R.S.C. 1927, c. 36, itself that such exemption from liability no longer exists.

Section 573 provides: "Every one is guilty of an indictable offence . . . who . . . conspires with any person to commit any indictable offence."

Section 2(13) provides: "'every one,' 'person,' 'owner,' and other expressions of the same kind include His Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts in

relation to such acts and things as they are capable of doing and owning respectively.”

There is no exception in the provisions of The Criminal Code which takes a married woman or her husband out of the scope of s. 573. On the contrary, the language in s. 573 is free from any ambiguity and includes within its ambit “every one”, whether married or separate. It does not permit the application of the theory that a man and his wife are to be regarded as one person. The criminal law of England as it existed on the 17th September 1792, made the criminal law of this Province by s. 10 of The Criminal Code, has been altered, varied, modified or affected, as therein provided, by s. 573 and s. 2(13). That view is consistent with the policy of our criminal law as illustrated by the enactment of s. 21 of The Criminal Code abolishing the presumption existing at common law that a married woman who committed an offence in the presence of her husband did so under his compulsion. The doctrine of coercion no longer applies in favour of a married woman and the rule relating thereto now applies for all persons alike, whether married or not. It would be an inconsistency indeed if Parliament intended by s. 21 to abolish the doctrine of coercion and at the same time permitted the common law theory of unity of married persons to be available in respect of the crime of conspiracy.

Finally, it seems to me beyond all common sense and reason, in these days when a married woman has equal rights with her husband to enter into agreements in the exercise of her own free will, to say that the law will not hold either of them responsible for conspiracy; that they may escape the penalty of their criminal conduct because of a legal fiction which has no place in our present society and which creates a failure of justice by its application. I am not willing to give life to a dead principle which would make an absurdity of part of our criminal law as it exists to-day. I do not attempt to usurp the function of Parliament to make laws, but I endeavour to interpret and apply the law as it now is, having proper regard in the present case to the great emancipation of married women. The antiquated, obsolete fiction of ancient times which deprived a married woman of legal life and existence ought to be left in its grave and in so far as it can do so, this Court ought to “stay the spade of the

legal resurrectionist", using words attributed to Lord Shaw of Dunfermline.

In accordance with my opinion as expressed, this appeal should be dismissed.

HOGG J.A. (*dissenting*):—The appellant, Harry Kowbel, was convicted by Magistrate W. W. McKeown of the city of Toronto upon two charges, first, that he "did conspire with Beatrice Kowbel to commit the indictable offence of forgery"; and second, that he, "during the months of July to October inclusive in the year nineteen hundred and fifty-two, at the City of Toronto in the County of York, unlawfully did conspire with one Beatrice Kowbel, to commit the indictable offence of uttering, using, dealing with, or acting upon certain documents, knowing the same to be forged".

The appellant was convicted and sentenced to 5 months in gaol on each charge, the sentences to run concurrently.

The accused bases the appeal against his conviction upon the ground that Beatrice Kowbel is his wife and a husband cannot conspire to commit a crime with his wife alone.

A conspiracy at common law is an agreement between two or more parties to commit an unlawful act or to do a lawful act by unlawful means. The gist of the offence is the agreement between the parties which may be inferred from the overt acts of each alleged conspirator without further proof.

The point raised in this appeal, although apparently on its face a simple one, is one with regard to which there is a paucity of authority in decisions of the Courts. The learned authors of works on criminal law state the bare proposition that at common law a husband cannot conspire with his wife nor can a wife conspire with her husband, and give as their authority the venerable doctrine that in the eyes of the common law there is unity in the persons of husband and wife. In consequence of the theory of conjugal unity by which the married pair were regarded by the common law as constituting only a single person, no criminal agreement to which they are the only two parties can amount to the crime of conspiracy, for a conspiracy needs two conspirators.

In 16 Halsbury, Laws of England, 2nd ed. 1935, it is stated at p. 711: "A husband cannot conspire with his wife, but may be an accessory after the fact to a felony committed by her."



Archbold's Criminal Pleading, Evidence and Practice, 32nd ed. 1949, p. 21, gives as authority for this theory of the common law, Hawkins's Pleas of the Crown, Book 1, c. 27, s. 8. Archbold states further that the rule does not depend upon the theory of coercion.

Roscoe on Criminal Evidence, 16th ed. 1952, p. 749, puts the matter in a few brief words. He says: "*Conspiracy*. A married couple cannot be guilty (only) with each other." He gives as his authority the case of *Rex v. Cope et al.* (1719), 1 Stra. 144, 93 E.R. 438.

Lush on Husband and Wife, 4th ed. 1933, p. 597, says: "The common law theory of unity between the spouses applied in some departments of criminal law. The spouses cannot be convicted of conspiracy, because that takes two, and they are but one. . . ."

Wright on Criminal Conspiracy, 1887, p. 59, states that the ancient writ of conspiracy appears not to have lain against husband and wife alone. He is of the view that the effect of the ancient authorities is doubtful in so far as a conspiracy in its modern form is concerned.

Harrison on Conspiracy, 1924, p. 76, says that it is generally stated as, for example, by Hawkins, *loc. cit.*, that husband and wife cannot by themselves be convicted of conspiracy. He further states that this was the case as regards the old writ of conspiracy of the days of Edward III.

Eversley on Domestic Relations, 6th ed. 1951, p. 150, after stating the old rule of the common law, says: ". . . but it is doubtful now whether that proposition would be held to be good law if it were shown that the agency of the wife was as active as that of the husband."

It is of some interest to observe the manner in which Blackstone approached the subject of the unity of man and wife. In Lewis's Edition, Book 1, p. 442, it is set forth: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; . . . Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of

such as are merely *personal*. For this reason, a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself. . . .”

In the following two cases the conspiracy involved a husband and wife and another person:

In *Rex v. Cope et al.*, *supra*, it was held that a husband and wife and their servants might be tried for conspiracy to ruin the trade of another person.

In *Regina v. Whitehouse et al.* (1852), 6 Cox C.C. 38, a husband and wife and their daughter were found guilty of conspiracy to obtain goods by false pretences. No mention was made of the fact that two of the alleged conspirators were man and wife.

However, in more recent times in *Rex v. Peel*, *The Times*, 8th March 1922, Mr. Justice Darling held that the old common law rule still obtained and that since it required at least two people to conspire, and since husband and wife were regarded as being one person in law, the situation was that they could not conspire.

The case of *Rex v. Nerlich* (1915), 34 O.L.R. 298, 24 C.C.C. 256, 25 D.L.R. 138, in this Court, is concerned with the question of a conspiracy to which it was alleged a husband and wife were parties. One Nerlich and his wife were indicted for conspiring “with each other and others” to aid one Zirzow, a German enemy, to leave Canada and join the enemy forces. The learned trial judge held that there was no evidence to sustain the charge of conspiracy against Mrs. Nerlich and she was acquitted by the jury, although her husband was found guilty. In this Court, upon the hearing of the appeal of the husband, MacLaren J.A. said at p. 304: “If only Mr. and Mrs. Nerlich had been indicted for conspiracy, her discharge would necessarily have been followed by his.” This was upon the ground that where two persons are indicted for conspiracy together and they are tried together both must be acquitted or both convicted unless they are also charged with conspiracy with other persons, known or unknown. The Court concluded that the evidence failed to establish conspiracy by Nerlich with anyone. Nowhere in the report of that case is there reference to the old common law rule that a man and his wife cannot be charged with conspiracy,

but this circumstance may have been on account of the fact that the conspiracy was not alleged to be between Nerlich and his wife alone. There is the authority of the decisions to which I have referred that a husband and wife and another can conspire to commit a crime.

In *The Director of Public Prosecutions v. Blady*, [1912] 2 K.B. 89, a majority of the Court held that a wife was not a competent witness for the prosecution on a charge against the husband that he was living on the earnings of prostitution of his wife who had commenced the prosecution. Mr. Justice Lush, in a dissenting judgment, said that the foundation of the rule which prevented a wife from giving evidence against her husband was the fact that they were one person in the eyes of the law. He further said, *obiter*, that under this rule "Husband and wife being one person could not be indicted or convicted of conspiracy one with the other".

In *Wenman v. Ash* (1853), 13 C.B. 836, 138 E.R. 1432, Mr. Justice Maule said that man and wife are in the eyes of the law for many purposes one person and for many purposes different persons. He gave as an example the rule that a wife cannot be an accessory after the fact to a felony committed by her husband when she receives and shelters him after a crime committed by him.

Assistance is furnished in resolving the problem by a judgment of the Court of Appeal of New Zealand. Although not binding upon this Court it is nevertheless the decision of an appellate Court of distinction in one of the Dominions of the British Commonwealth. In *Rex v. McKeachie*, [1926] N.Z.L.R. 1, it was held by the majority of the Court that, as stated in the headnote: "Husband and wife cannot conspire together so as to be guilty of the crime of conspiracy."

Chief Justice Stout, in a dissenting judgment, was of the opinion that the basis of the common law rule was not that husband and wife were one in law but that the husband was supposed to dominate and control the acts of his wife. The principle of the common law of coercion by a husband of his wife was modified by the New Zealand Crimes Act, which did away with the presumption of the common law that there was compulsion by the husband when his wife committed a crime in his presence. He further said that the section of the statute



which created the offence set out that "Everyone is liable", etc., and read in their natural meaning, these words included husband and wife.

Mr. Justice Reed, who delivered the judgment of the majority of the Court, stated that the rule as set forth in Hawkins's Pleas of the Crown that a husband and wife could not alone be guilty of conspiracy because they were esteemed but one person in law, had been expressed to be the existing law by the authors of text-books of repute. He also referred to the fact that under The Crimes Act defences available at common law remained in force unless altered or unless inconsistent with the Act. He did not consider the language of the section creating the offence altered or was inconsistent with the rule in question.

Mr. Justice Ostler was of the opinion that the rule of the common law in question was not now a defence to the charge of conspiracy because of the entirely different status a wife had with respect to her rights concerning property. He was of the opinion that the reason for the old common law rule had disappeared before the passing of the Criminal Code Act in 1893 and that (p. 17): "Consequently the tooth of Time had eaten away the old rule before the passing of the Criminal Code, so that it was no longer common law in 1893."

Section 219 of the New Zealand statute, dealing with conspiracy, commences, as do the sections dealing with conspiracy in our Code, with the words "Every one is guilty". When the definition of the words "every one", "person", "owner", as set out in s. 2(13) of our Code is read, it is to be observed that "every one" includes Her Majesty the Queen and, *inter alia*, all inhabitants of counties, etc., "in relation to such acts and things as they are capable of doing and owning collectively". These latter words are words of qualification or limitation and under the common law, as I see the matter, to conspire with her husband is not such an act or thing as a married woman as a "person", or as one within the class of "every one", is capable of doing. In other words, it is only those capable of conspiring who are embraced by and included in s. 444.

I am in agreement with the decision of the majority of the New Zealand Court, for the reasons which I shall now endeavour to set forth.

Our statute law recognizes the intimate relationship of husband and wife, as, for instance, by s. 4 of The Canada Evidence Act, R.S.C. 1927, c. 59, where it is provided that no husband shall be compellable to disclose any communication made to him by his wife during their marriage and no wife shall be compellable to disclose any communication made to her by her husband during their marriage.

The Criminal Code has abolished some of the old common law doctrines arising from the relationship of a man and his wife. The conception that it must be presumed that a married woman committing an offence did so under compulsion if she committed it in the presence of her husband was abolished by s. 21 of the Code, but there are other rules of the common law which have not been dealt with but have been left untouched by the Code.

Some doubt is created whether the time-honoured rule of the common law now under consideration may have been superseded because in these modern times a wife, as separate from her husband, enjoys, because of the provisions of statutes such as The Married Women's Property Act, now R.S.O. 1950, c. 223, many rights and privileges which did not pertain to her in past days, but I think that The Criminal Code itself seems to furnish the answer to the problem. Section 10 introduced into Ontario the criminal law of England as it existed on the 17th September 1792, except where it was repealed, altered or varied. Section 16 of the Code provides: "All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith."

It was held in earlier times in this Province in *Rex v. Cole* (1902), 3 O.L.R. 389, 5 C.C.C. 330, by Chancellor Boyd, that the common law jurisdiction as to crime is still operative notwithstanding the Code unless there is such repugnancy as to give prevalence to the latter law.

In the Supreme Court of Canada in *The Union Colliery Company v. The Queen* (1900), 31 S.C.R. 81, 4 C.C.C. 400, Sedgewick J., who read the judgment of the majority of the Court, said at p. 87: "Parliament never intended to repeal the common law,

except in so far as the Code either expressly or by implication repeals it."

The Code preserves the common law, not only in so far as it affords a defence in cases not expressly provided for, but also in so far as it may afford a ground of prosecution in cases not expressly provided for.

An instance of a common law defence still existing apart from the Code is where a plea of *autrefois convict* could not be set up as a complete answer to an indictment, but the defendant would still be entitled to the benefit of a conviction recorded against him, as a defence under the common law: *Rex v. Quinn* (1905), 11 O.L.R. 242, 10 C.C.C. 412, in the Court of Appeal for Ontario.

There seems to be no doubt that at common law a husband and wife could not conspire alone and that the common law doctrine would furnish a defence to either a husband or a wife charged with conspiring with each other alone to commit a crime. If this is so, and I cannot reach the conclusion that the old common law has ever been altered, abrogated or abolished, or that it is inconsistent with any provision of the Code, then, because of s. 16, this principle of the common law furnishes a defence to the charge against the appellant. It is the Parliament of Canada and not the Courts which has the power to alter and modify the criminal law and to take away from an accused person a defence which he may have under the common law. The mere passage of time and the changed conditions under which a husband and wife live in their relations to each other in these days, especially with respect to the extensive rights conferred upon married women with regard to property, are not, as I see the matter, a sufficient sanction to deprive an accused of a defence and to transfer to the Court a power that may be exercised only by Parliament.

It has often been said that the Courts sometimes make law. This theory, however, does not imply that the Courts deliberately take the place of the legislature in creating a new law or amending an old one. It means rather that the interpretation or construction that the Courts have, on occasion, placed upon a rule of law, in applying it to circumstances that may be new or unusual, produces a result which was not previously established.



I am of the opinion that the appeal should be allowed and the conviction of the appellant Kowbel of conspiracy should be quashed.

J. K. MACKAY J.A. agrees with LAIDLAW J.A.

*Appeal dismissed, HOGG J.A. dissenting.*

*Solicitor for the appellant: Francis L. O'Donnell, Toronto.*

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[COURT OF APPEAL.]

Regina v. McKay and Quinlan.

*Evidence — Admissibility — Production of Articles Alleged to have been in Accused's Possession — Whether Possession Established — Joint Trial of Several Accused.*

*Criminal Law — Possession — Circumstantial Evidence on Charge of Attempted Robbery — Whether Articles Proved to have been in Possession of Accused — Joint Trial of Several Accused — Knowledge and Control — The Criminal Code, R.S.C. 1927, c. 36, s. 5.*

The position of an accused person cannot be prejudiced by the fact that he is indicted and tried jointly with others. He is entitled in law to be in the same position in respect of the admission of evidence against him as if he had been charged and tried alone, and evidence that would not be admissible if he were being tried alone cannot be admissible against him merely because he is charged and tried with others, against some or all of whom it may be admissible.

Three men, W, M and Q, were jointly charged with an attempt to rob a bank employee. Evidence was given of a "hide" behind the wall of a clothes-closet in a room occupied by W, and of the finding therein of a large number of articles corresponding to articles used in the attempted robbery, together with some papers alleged to belong to M. There was no evidence that M had possession or control of the hide and the articles in it, or that he had a right of access to it, nor was there any evidence of knowledge on his part that the papers apparently belonging to him were there. M was found in W's apartment when the police officers entered it the day after the crime, but there was no evidence that he lived there.

*Held, HOGG J.A. dissenting:* the evidence of the finding of articles in the hide was not admissible as against M, and since the remaining evidence, properly admitted against him, was not sufficient to support a conviction, he should be acquitted. The fact that his property (if the papers were his property) was found in the hide did not permit any inference that it was put there by him or with his permission or knowledge. *Rex v. Higginbottom* (1912), 8 Cr. App. R. 79, applied.

*Per HOGG J.A., dissenting:* There was some evidence from which the jury could draw an inference that M had joint possession with W of the articles in the hide, having regard to the meaning and construction put by the authorities on the word "possession" as used in s. 5(2) of The Criminal Code. Since there was some evidence, and the trial judge would not have been justified in withdrawing the case from the jury, the Court of Appeal could not interfere, even if it would not have reached the same conclusion on the evidence. *McCannell v. McLean*, [1937] S.C.R. 341, applied.

APPEALS by two accused from their conviction (jointly with one Wood, who did not appeal), before LeBel J. and a jury, of

assault with intent to rob. The appeal of the accused Quinlan was allowed at the hearing, and the argument is noted only in respect of the accused McKay.

9th June 1953. The appeal was heard by LAIDLAW, HOGG and J. K. MACKAY JJ.A.

*G. A. Martin, Q.C.*, for the accused Quinlan, appellant.

*C. L. Dubin, Q.C.*, for the accused McKay, appellant: 1. The incriminating articles found in the "hide" in Wood's apartment were not evidence against McKay, notwithstanding the fact that the police also found in the same place papers bearing McKay's name and appearing to belong to him. The case for the Crown was based on the theory that Wood and McKay were in joint possession of these articles, but the learned trial judge did not instruct the jury at all as to what constitutes possession in law, and simply left to them the whole evidence as to the articles found, as if it was evidence equally against both accused. It was not admissible against McKay at all without some proof that he was in some way in possession of the incriminating articles: Phipson on Evidence, 9th ed. 1952, p. 138; Wills on Circumstantial Evidence, 7th ed. 1937, p. 89.

2. There was no evidence that these goods were ever in McKay's possession, and no evidence to support a finding of joint possession under s. 5(2) of The Criminal Code, R.S.C. 1927, c. 36. To amount to joint possession under that subsection there must be some element of control on the part of the person who is not in actual physical possession. Here there is no evidence even of knowledge on our part. The mere finding of McKay's documents (even assuming, which was not established, that they were in fact his) does not put him in possession. [LAIDLAW J.A.: The Crown's position seems to be rather that it says, we prove that these documents, belonging to you, were found with articles taken from the bank.] But the evidence of the finding of these things is not admissible against us unless they were in our possession, either joint or exclusive. The case was put in that way by the Crown Attorney in opening to the jury. But the trial judge did not put this evidence to the jury in that way; he dealt with Wood and McKay together, without any instruction as to the law respecting possession. I refer to *Rex v. Colvin and Gladue*, 58 B.C.R. 204, 78 C.C.C. 282, [1942] 3 W.W.R. 465, [1943] 1 D.L.R. 20; *Rex v. Lou Hay Hung*, [1946] O.R. 187, 85

C.C.C. 308, 1 C.R. 274, [1946] 3 D.L.R. 111; *Rex v. Martin*, [1948] O.R. 962, 92 C.C.C. 257, 7 C.R. 44.

3. The evidence of association between Wood and McKay is wholly insufficient to support a conviction. Buckley's evidence, had it been accepted, would have established an alibi, but it was rejected. The other evidence does not bring the case within the requirements laid down in *Rex v. Dibble, alias Corcoran* (1908), 1 Cr. App. R. 155.

4. The learned trial judge erred in telling the jury that the Crown had proved that these documents belonged to McKay—there is no evidence whatever to support that statement. The mere name on the documents (even if it is assumed that it was McKay's name) is not proof that they belonged to him. It is not without significance in this connection that Wood was proved to have used many aliases: *Rex v. Rogers* (1914), 24 Cox C.C. 465.

5. The trial judge erred in failing to leave the case in respect of each accused to the jury separately. The case against Wood was completely different from that against McKay, and it was essential that they should be differentiated in the charge to the jury: *Rex v. Stephen, Allen and Douglas*, [1944] O.R. 339, 81 C.C.C. 283, [1944] 3 D.L.R. 656.

*C. P. Hope, Q.C.*, for the Attorney-General, respondent: The Crown's case is circumstantial, depending completely on the circumstances revealed by the evidence to implicate the three accused. As to Wood and McKay, the Crown proved association before and after the crime, and from this association at the crime can be inferred. As to the admissibility of the evidence of the articles found in the hide, I rely on *Riendeau v. The King*, 87 C.C.C. 193, 2 C.R. 493, [1947] 1 D.L.R. 673; *Rex v. Edwards*, [1945] O.W.N. 149, 83 C.C.C. 235, [1945] 2 D.L.R. 606.

If the papers that were found in the hide had been found in the bank after the attempted robbery they would surely have been evidence against McKay if we had proved that they belonged to him. [LAIDLAW J.A.: I can see no analogy.]

*C. L. Dubin, Q.C.*, in reply: Access to a cupboard is not the same thing as possession of what is in the cupboard. In any case, there is no evidence at all that we even had access to this cupboard. The *Riendeau* and *Edwards* cases, *supra*, are quite distinguishable on their facts.

*Cur. adv. vult.*



24th June 1953. LAIDLAW J.A.:—The appellant Arthur McKay was indicted jointly with Robert Wood *alias* Sidney Clews and with Norman Quinlan on two counts—first, that on or about the 12th November 1952, being armed with offensive weapons, they did unlawfully assault Gordon Robinson, an employee of the Canadian Bank of Commerce, with intent to rob him of the property of the Bank then in his charge or custody as such employee; second, that on or about the 13th November 1952, they did unlawfully have offensive weapons in their possession for a purpose dangerous to the public peace.

After trial together before LeBel J. and a jury, the accused were convicted on 13th February 1953 on the first count. The foreman of the jury stated: “We decided only on the first count. We thought if we reached a verdict on the first charge, the second count is dropped.” Counsel for the Crown, in answer to a question of the learned trial judge, stated that he was content, and his Lordship thereupon directed the jury to find a verdict of not guilty on the second count. The jury indicated that they were all content to do so.

On appeal by the accused Quinlan to this Court from his conviction, counsel for the Crown stated that in his opinion there was not sufficient evidence to support the verdict against Quinlan, and the Court, being of the same opinion, thereupon allowed his appeal, quashed his conviction and directed that a verdict of acquittal be entered.

The Court took time to consider the matters in controversy in the appeal by McKay from his conviction and the sentence imposed upon him.

Counsel for the Crown at trial and in this Court stated that the case for the prosecution against the appellant McKay consisted wholly of circumstantial evidence. The main ground of appeal is that a large and substantial part of the evidence adduced by the prosecution and admitted at trial was not admissible as against the appellant McKay. That evidence showed that on the 14th November 1952 police officers went to the house where the appellant Quinlan and his wife resided. The upper storey of that house consisted of a kitchen, bedroom (referred to as “the middle bedroom”), bathroom and living-room suitable for use as a bedroom (referred to as “the front bedroom”). According to the evidence of Mrs. Quinlan, that part of the house

had been rented as a flat or apartment early in October to the accused Wood under the name "Munro". The middle bedroom had a built-in clothes cupboard, and the inner wall of that cupboard could be revolved by a person who knew how to do so and entry could thus be made to a small compartment beneath the roof of the house, called in the evidence a "hide". In that hide the police officers found a large number of articles, which were listed and, with a few exceptions, were filed in evidence as exhibits. There were articles of clothing of the same kind and description as those worn by the two persons who committed the offence with which the appellants were charged in count 1 of the indictment. There were items such as a key which fitted a "protectograph" belonging to the branch of the bank where the offence was committed, and handcuffs of the kind used in the commission of the offence.

In addition, the police officers found a number of things which the Crown maintains belonged to the appellant McKay. There was a diary which a police officer testified was "the property of Arthur A. McKay, 536 Danforth Avenue, Toronto", and "one National Registration identity card for one Arthur A. McKay", "one claimant's identification book, bearing the name A. A. McKay, insurance no. M469213, one insurance book bearing the name Arthur A. McKay, no. M469213, and what appears to be part, the bottom two-thirds part, of a birth certificate". The officer testified as to the contents of the available part of the birth certificate. There was found also a number of personal letters, and the police officer stated, "Some of these letters are addressed to a person, 'Dear Art' ". Counsel for the Crown filed as exhibits the unemployment insurance papers, the National Registration identity card and the birth certificate only, and it was noted by permission of the Court "that there were what appeared to be personal letters commencing with the words, 'Dear Art' ". Finally, there were three revolvers found in the hide, which I presume were the subject of the charge against the appellants in count 2 of the indictment, upon which charge, with the assent of Crown counsel and upon the direction of the learned trial judge, the accused were found not guilty.

There was no evidence adduced to show when those articles said to belong to the appellant McKay were put in the hide, or who put them there, or that the appellant McKay had any knowl-

edge whatsoever that they were in that place. There was no evidence that he had any right of access to that hide, and no evidence from which it could be found that he had possession or the right to possession of it, jointly or otherwise. All that appears is that when the police officers went to Quinlan's house about 5 o'clock in the afternoon of 13th November they found the accused Wood and McKay and a third man, Buckley, seated at a table in the kitchen of the upstairs flat. They were eating a meal from a box. They were told by the police officers that they would have to go to the police station. McKay had no shoes on and, when given permission to put them on, he went into the front bedroom, got his shoes from a clothes-press in that room, and also changed his clothes and got a suit and topcoat from the clothes-cupboard in the room. Wood went from the kitchen into the middle bedroom and took a topcoat from a clothes-press in that room. That clothes-press or closet is the one from which entry is made to the "hide".

Counsel for the appellant McKay contends that, in the absence of any evidence showing that McKay had possession or a right to possession or control of or access to the hide and, further, in the absence of knowledge on his part of the contents of the hide, evidence of the fact that articles appearing to belong to him were found there on the second day after the commission of the offence charged against him and the other two accused persons is not admissible to incriminate him. I am satisfied that argument is sound in law. The position of the appellant McKay cannot be prejudiced by the fact that he was indicted and tried jointly with other accused persons. He is entitled in law to be in the same position with respect to the admission of evidence against him as though he were charged and on trial alone. Plainly, evidence which would not be admissible in that case would not be admissible against him merely because he was charged and tried together with another person or persons. On a separate trial, evidence of the fact that articles said by the Crown to be his property were in the possession or under the control of Wood could not be evidence to implicate McKay in the commission of the offence with which he was charged unless it was proved by the prosecution that he had knowledge that the property was in the hide. The fact that it was found there does not, in the circumstances of this case, permit any inference that it was put there



by him or with his permission or knowledge. It does not call for any explanation on his part and is not a circumstance implicating him in the crime charged.

In *Rex v. Higginbottom* (1912), 8 Cr. App. R. 79, the accused D was indicted with J for receiving stolen property; the two prisoners were tried separately. The only evidence against D was that a portion of the stolen goods was found in his house some three months after the burglary was committed by J. J and D lived in the same house at the time of their arrest. The only evidence of possession by D was that the goods were found in a box which belonged to J but of which D had the key. Channell J., for the Court (composed of Darling, Channell and Avory JJ.), said:

“The real difficulty of the case is that there was no evidence that the appellant [D] was ever in possession of any of the stolen property. It may be that it was found in a box of which he had the key, but there was no evidence that he knew it was there, and property belonging both to the appellant and to Joshua Higginbottom [J] was found there.”

If the evidence to which counsel for the appellant McKay takes exception is excluded from the case for the prosecution against McKay, it must then be held on the remainder of the circumstantial evidence adduced against him that it could not be found to be consistent only with his guilt of the offence with which he was charged in count 1 of the indictment and inconsistent with any other rational conclusion. In my opinion, the jury should have been directed to find a verdict that the accused McKay was not guilty on that charge.

I would allow the appeal by the appellant McKay, quash his conviction on the charge contained in count 1 of the indictment, and direct a verdict of acquittal on that charge.

HOGG J.A. (*dissenting*):—On the 13th February 1953 the appellant, Arthur McKay, together with Robert Wood and Norman Quinlan, was found guilty by a jury at the assizes held in the city of Windsor presided over by Mr. Justice LeBel, upon the charge that they “at the City of Windsor in the County of Essex, on or about the 12th day of November, 1952, being armed with offensive weapons, to wit: revolvers, did unlawfully assault Gordon Robinson, an employee of the Canadian Bank of Commerce, with intent to rob him of the property of the said

Canadian Bank of Commerce, then in his charge or custody, as such employee, contrary to The Criminal Code". Wood and the appellant McKay were each sentenced to 12 years' imprisonment and Quinlan to 15 years. The conviction of Quinlan was quashed on an appeal by him to this Court upon the ground that there was no evidence on which the jury could find him guilty of the offence.

McKay appeals upon the ground that there is no evidence to go to the jury upon which they could find that there was possession by the appellant, or joint possession by the appellant and Wood, of certain articles found in or upon the premises occupied by Wood. In other words, it is contended on behalf of the appellant that there was no evidence upon which the jury could base a finding that the appellant was connected with the offence charged.

The learned trial judge impressed upon the jury that the case against all of the accused was entirely circumstantial and clearly directed them as to the rule which must guide a jury in their consideration of circumstantial evidence.

The matter of possession or joint possession of goods or articles has been discussed in a number of cases in which stolen goods were in question and in cases arising under The Opium and Narcotic Drug Act, now 1929 (Can.), c. 49.

"Possession" is defined by s. 5 of The Criminal Code, R.S.C. 1927, c. 36, as follows:

"5. In this Act, unless the context otherwise requires, . . .

"(b) having in one's possession includes not only having in one's own personal possession, but also knowingly,

"(i) having in the actual possession or custody of any other person, and

"(ii) having in any place, whether belonging to or occupied by one's self or not, for the use or benefit of one's self or of any other person.

"2. If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them."

There is no doubt that "possession" as defined by the Code contemplates the element of control. Although a person may

not have actual possession of an article, he may have constructive or indirect possession: *Rex v. Martin*, [1948] O.R. 962, 92 C.C.C. 257, 7 C.R. 44; *Rex v. Lou Hay Hung*, [1946] O.R. 187, 85 C.C.C. 308, 1 C.R. 274, [1946] 3 D.L.R. 111. Under s. 5(2) both knowledge and consent are necessary: *Rex v. Colvin and Gladue*, 58 B.C.R. 204, 78 C.C.C. 282, [1942] 3 W.W.R. 465, [1943] 1 D.L.R. 20.

In *Rex v. Kushman*, [1949] 1 W.W.R. 24, 93 C.C.C. 231, 7 C.R. 291, where the question of possession under s. 5 of the Code was under consideration, Sloan C.J.B.C. again reaffirmed the proposition stated in earlier judgments, that possession under this section of the Code is a matter to be determined on the facts of each particular case.

In *Rex v. Edwards*, [1945] O.W.N. 149, 83 C.C.C. 235, [1945] 2 D.L.R. 606, in an appeal to this Court from the conviction of the appellant by a jury on a charge of breaking and entering a store and committing therein the indictable offence of theft, certain articles identified as stolen goods were found in an apartment of which the appellant was the tenant and others in a room rented by the appellant in a rooming-house. There was evidence that other persons had access to the premises which had been occupied by the appellant. Robertson C.J.O. said that no doubt the general rule applicable to circumstantial evidence applied to the circumstances of the case. He stated that the finding of narcotics in the rooming-house would not, in itself, support an inference that they had been placed there by the appellant or that they had ever been in his possession, but it was not necessary that the several circumstances relied on by the prosecution should be regarded separately. "On the contrary the circumstances may properly all be considered together, and, considered together, they may lead to a conclusion that their consideration, each one by itself, would not support." He said that the facts were all before the jury and they were entitled to draw reasonable inferences from such facts.

The facts, in brief, which seem to be material to a consideration of this appeal, are as follows: A branch of the Canadian Bank of Commerce in the city of Windsor was entered shortly before 10 o'clock in the morning on the 12th November 1952 by two masked men, each of whom had a dark-coloured revolver and one of whom wore horn-rimmed glasses. Both men were



dressed in brown clothes, and each was noticed to have scotch tape on his fingers. They made use of a number of handcuffs of Spanish make marked with the name "Chief of Police". One of the two men was seen to take certain keys from a drawer in the bank, one of which was the key to the burglar-alarm connected with the bank, and the other was the key to a cheque-writer, called a "protectograph", used by the bank.

The said Norman Quinlan resided at 480 Tecumseh Road East in Windsor, and in October 1952 his wife rented an upstairs apartment, which formed part of the premises, to the said Wood who was then known as Munro. This apartment consisted of a living-room, a bedroom, a bathroom and a kitchenette. On the 13th November, the day after the bank had been entered, Quinlan's house was entered by police officers. They found the appellant and Wood and one Buckley in the kitchenette of the afore-said flat or apartment engaged in eating a meal. The appellant was without his shoes and before being taken to police headquarters he went into one of the rooms where he changed his trousers and put on a pair of shoes and an overcoat. On the 14th November the police went to the middle bedroom, in which there was a clothes-closet, and when they pulled on one of the hooks on a wall of this closet the wall swung open. In this space behind the wall of the closet, which has been termed a "hide", were found three revolvers, two of them dull black in colour, some ammunition of the same type as was found in the bank, a pair of horn-rimmed glasses, and two pairs of Spanish "Chief of Police" handcuffs similar to those found at the bank. There were also handcuff-keys which fitted the handcuffs and scotch tape holders. There was found string, the same as that used at the bank, certain brown-coloured clothing, and two hats. There was also found a key which fitted the "protectograph" machine. In addition, there was found in this "hide" a package of personal papers of the appellant McKay.

It is contended on behalf of the Crown that McKay and Wood shared the apartment and made common use of the rooms therein and that the finding of McKay's personal papers in the "hide" established joint possession, as contemplated by s. 5(2) of The Criminal Code, of the articles found therein, such articles being, it is argued, in the possession of Wood with the knowledge and consent of the appellant McKay. On the other hand, it is contended by counsel for the appellant that the appellant did not

have possession, either actual or constructive, of any of the articles in the so-called "hide" and did not have access to the hide or control over it or the articles found therein, nor did he know they were in the "hide". It is argued that this evidence relating to the articles found in the hide cannot be evidence against the appellant.

The question before this Court is whether the circumstances which I have outlined furnished any evidence from which the jury could draw an inference that the appellant had joint possession with Wood of the aforesaid articles, having regard to the meaning and construction placed upon the term "possession" as it appears in s. 5(2) of the Code.

The appellant was tried by a jury and not by a magistrate or a judge alone. This Court is entitled to find the decision of a judge sitting alone to be wrong and to set his judgment aside on an entirely different principle from that on which this Court can find a jury to have been in error and set aside their verdict. If there is some evidence for the jury upon the point in issue, that is to say, if there is evidence of such a character that the trial judge could not properly have withdrawn the issue from the jury, then the power of this Court to set aside a verdict can only be exercised upon the principle which was stated by the Supreme Court of Canada in *McCannell v. McLean*, [1937] S.C.R. 341, [1937] 2 D.L.R. 639. If there is no evidence to warrant a finding of fact by a jury, so that the trial judge could properly have withdrawn the issue from the jury, then this Court can and should interfere. It is for the trial judge to decide whether there is any evidence upon which the jury can reasonably find that the party on whom the burden of proof lies has established the fact or facts which it is necessary for him to prove. It is for the judge to determine whether it is open to the jury to draw an inference from the facts proved, leaving it to the jury to say whether or not such an inference shall be drawn from such facts. If there was evidence, it was for the jury to find whether the appellant had joint possession of the articles in question, either actual or constructive, although this Court might not of itself have drawn the same inference, and although this Court might consider that the evidence was not of marked weight.

The appellant was found with Wood in Wood's apartment the day after the offence was committed in circumstances from which it could be reasonably inferred that they were friends, and in

fact somewhat intimate friends. McKay was dining with Wood and another man in the kitchen of the latter's small apartment, sitting there without his shoes. The appellant was apparently quite at home in the apartment to the extent that he had taken off his shoes and had clothes there other than those he was wearing, for when the police entered he went into the living-room, in which there was a couch or bed, put on his shoes, changed his trousers, and got his overcoat.

It seems somewhat remarkable that McKay should be on what might be called intimate terms with Wood, be in Wood's apartment the day after the bank was entered into, eating a meal with him, be so much at home that he was dining with Wood without his shoes and had changed his trousers in one of the rooms, and yet have no knowledge, and have given no consent, that personal papers belonging to him were in the same small apartment, where they were found there two days after the offence was committed. I am unable to conclude that these circumstances are entirely irrelevant and that they were not some evidence—the weight of which was for the jury—that the jury were entitled to consider upon the subject of whether the articles in question were in the hide with the appellant's knowledge and consent and within his control.

The attention of the Court has been drawn to the decision of the Court of Criminal Appeal in *Rex v. Higginbottom* (1912), 8 Cr. App. R. 79. The Court was composed of Darling, Channell and Avory JJ. There the appellant was convicted of feloniously receiving stolen goods. The ground of appeal was that he did not know the stolen property was in his house until it was found by the police. He and another were tried separately, and the other was found guilty of burglary. The only evidence against the appellant was that a portion of the stolen property was found in his house, in August 1912, although the burglary had been committed in May 1911, fifteen months before such articles were found. The two accused lived in the same house at the time of their arrest, but the appellant had lived in a different house until November 1911. The goods were found in a locked box belonging to the other accused, although the appellant produced a key of the box. Channell J., delivering the judgment of the Court, said:

“The real difficulty of the case is that there was no evidence that the appellant was ever in possession of any of the stolen



property. It may be that it was found in a box of which he had the key, but there was no evidence that he knew it was there, and property belonging both to the appellant and to [the other accused] was found there. There was therefore no substantial evidence of what was really the root of the case. This was not pointed out to the jury by the Chairman, and his summing up contained several inaccuracies which may have led the jury from the real point in the case, namely, what evidence was there that he knew the stolen property was in his house. This was never put to the jury, and as there was no really substantial case, if the point had been properly put to the jury, they would probably have acquitted him. . . . ”

The conviction was quashed.

In the *Higginbottom* case the only circumstances present connecting the appellant with the offence were that fifteen months after the offence had been committed stolen goods were found in a house in which the appellant then lived, in a box which belonged to the other accused but of which the appellant had the key.

The facts of the present case are entirely different. For example, there is the extremely short interval of time that elapsed between the day on which the offence was committed and the day on which the articles were found in the “hide”, and there are also all the other circumstances brought out in evidence which I have outlined. As was said by Sloan C.J.B.C. in *Rex v. Kushman, supra*, each case must depend entirely on its own circumstances, and the circumstances that some of the facts in the *Higginbottom* case are of a similar nature in several respects to those of the present one, does not establish any principle. I quite agree that in that case there was no evidence to be placed before the jury. In the present case, in my opinion, there was some evidence which the jury were entitled to consider. I would dismiss the appeal.

J. K. MACKAY J.A. agrees with LAIDLAW J.A.

*Acquittals directed*, HOGG J.A. dissenting as to McKay.

*Solicitors for the accused Quinlan, appellant: Riddell & Winters, Windsor.*

*Solicitor for the accused McKay, appellant: Morris Kamin, Windsor.*

[COURT OF APPEAL.]

**Dilworth et al. v. The Town of Bala and The Royal Bank of Canada.**

**The Royal Bank of Canada v. The Town of Bala.**

**Malvern Construction Company Limited v. The Town of Bala.**

*Municipal Corporations — Powers — How Exercised — Necessity for By-law — Exceptions to Rule — Municipality Receiving Benefit of Work Authorized by Resolution only — Attempt to Evade Payment on Ground of Absence of By-law — Work Done in Pursuance of Statutory Obligation on Municipality.*

There are numerous decisions in Ontario holding that a by-law is unnecessary to render a municipal corporation liable to pay for services fully performed or to repay moneys borrowed by it where the services were for its lawful benefit or the moneys borrowed were expended for its lawful benefit, and where the dealings in question have been directly with the council, formally evidenced by resolution of the council and by the affixing of the corporate seal. *Armstrong v. The Township of West Garafraxa* (1879), 44 U.C.Q.B. 515; *Witherspoon v. Township of East Williams* (1918), 44 O.L.R. 584; *McBain v. Township of Cavan* (1913), 5 O.W.N. 544; *Donovan v. City of Belleville*, [1931] O.R. 731, applied. The decision of the Privy Council in *John Mackay and Company v. The City of Toronto*, [1920] A.C. 208, is not an authority to the contrary. Judgment of SMILY J., [1952] O.R. 703, affirmed.

APPEALS by the plaintiffs in the first action and the defendant in the other actions from judgments of Smily J. The judgment of Smily J. in the first action is reported, [1952] O.R. 703, [1952] 4 D.L.R. 281. The judgments in the other two actions, which were based on the same reasons, are not reported.

20th, 21st and 22nd May 1953. The appeals were heard by AYLESWORTH, J. K. MACKAY and GIBSON JJ.A.

*H. E. Manning, Q.C. (R. F. Reid, with him)*, for the appellants Dilworth et al.: The issue in these appeals is whether the prohibitory provisions of The Municipal Act, R.S.O. 1950, c. 243, and certain provisions of The Ontario Municipal Board Act, R.S.O. 1950, c. 262, are effective. Our contention is that municipal councils and other persons who disregard the provisions of the statutes do so at their peril.

The acts upon which the trial judgments are founded are *ultra vires* of the defendant Town, since no vote of the electors was ever taken to authorize the works in question, as required by s. 300(1) of The Municipal Act. Further, there was no valid report under s. 109 of The Public Health Act, R.S.O. 1950, c. 306. No order was ever made by The Ontario Municipal Board dispensing with a vote. The order that was made by the Municipal

Board was null and void by reason of the failure of the Board to hear and determine the application for approval of the works in question and the failure of the Board to give an opportunity to persons who filed objections to present their objections and be heard. No by-laws were ever enacted by the council for the incurring of the obligations in question, as required by s. 259(1) of The Municipal Act.

The Municipal Board does not acquire jurisdiction without first hearing and determining the issue: *Cresswell v. The Etobicoke-Mimico Conservation Authority*, [1951] O.R. 197, [1951] 2 D.L.R. 364; *Rex v. Tribunal of Appeal under the Housing Act, 1919*, [1920] 3 K.B. 334; *Hopkins et al. v. Smethwick Local Board of Health* (1890), 24 Q.B.D. 712; *Cooper v. Wands-worth District Board of Works* (1863), 14 C.B.N.S. 180, 143 E.R. 414; *In re The Child Welfare Act*; *In re Gorenstein*, 59 Man. R. 1, 1 W.W.R. (N.S.) 16, [1951] 1 D.L.R. 455.

By-law 312 contains no clause authorizing temporary borrowing and the bank must have known that such approval was necessary, and should have seen, before it made any advances, that an appropriate by-law was enacted. No by-law authorizing temporary borrowing ever became effective.

Although the Department of Health gave approval under s. 104 of The Public Health Act for the construction of specific works, many diversions and omissions occurred in the actual construction. No application for approval of these diversions and omissions was ever made. The approval of each particular waterworks and sewage system is required under the Act in the case of every kind of work, however it is originated and whether it is done under The Local Improvement Act, R.S.O. 1950, c. 215, The Municipal Act, or some other statute, and this approval is a separate matter from the report in writing called for under s. 109: ss. 101 and 106(2) of the Act.

By reason of the absence of any by-law authorizing the letting of contracts and of any by-law authorizing the borrowing of money, no obligation ever arose as between the Town and the contractors or the bank: *John Mackay and Company v. The City of Toronto*, [1920] A.C. 208, 48 D.L.R. 151, [1919] 3 W.W.R. 253; *The Waterous Engine Works Company v. The Town of Palmerston* (1892), 21 S.C.R. 556; *The City of Victoria v. Bishop of Vancouver Island*, [1921] 2 A.C. 384, 59 D.L.R. 399, [1921]



3 W.W.R. 214; *Waterous Engine Co. v. Town of Capreol*, 52 O.L.R. 247, [1923] 3 D.L.R. 575.

The authorities relied upon by the trial judge are at variance with the established and binding decisions and are, with one exception, earlier than the *John Mackay and Company* decision, *supra*. They are therefore not binding on this Court. *Donovan v. City of Belleville*, [1931] O.R. 731, [1931] 4 D.L.R. 268, merely affirmed a judgment of Logie J., reported in 65 O.L.R. 246, [1930] 3 D.L.R. 434, which rejected a claim founded on a contract not authorized by by-law.

When property has been received by a corporation as a result of a transaction that is *ultra vires*, the corporation cannot be held liable *ex contractu* for the value of the property: *Sinclair v. Brougham et al.*, [1914] A.C. 398. It can only be required to account for and deliver up that property or its proceeds. If and to the extent that money has been received and applied in satisfaction of debts actually owing, then on a principle analogous to subrogation the lender on the *ultra vires* transaction may recover it. In the present case, since no contractor had any right against the Town *ex contractu*, there is nothing to which the bank can be subrogated. Money advanced by it was spent illegally by the representatives of the taxpayers and those taxpayers cannot be made answerable through their corporation.

The principle underlying the authorities that hold that a by-law is unnecessary where a corporation proceeds to act in pursuance of a statutory duty does not apply to municipal corporations: *John Mackay and Company v. The City of Toronto*, *supra*.

*E. L. Weaver, Q.C.*, for the Town of Bala: To avoid the necessity for obtaining the consent of the electors the council requested mandatory orders from the Department of Health by resolutions dated 9th December 1949 and 9th January 1950. The works were not carried out in accordance with these orders. No by-laws were ever passed authorizing the works. By-law 312 is a debenture by-law only. Section 259(1) of The Municipal Act requires a municipality to act by by-law. Further, the debenture by-law, no. 312, is void for uncertainty as to the manner of levying rates, under s. 298(4) of the Act. The approval of the Municipal Board to By-law 312 was a nullity since no public hearing of the application was held by the Board and objectors to the scheme

were not heard as required by s. 23 of The Ontario Municipal Board Act.

No by-law was ever passed authorizing the execution of contracts with Malvern Construction Company Limited, but only a resolution. The Town received no benefit from the works since they were never properly completed. I rely on: *John Mackay and Company v. The City of Toronto, supra*; *The Waterous Engine Works Company v. The Town of Palmerston, supra*; *Waterous Engine Co. v. Town of Capreol, supra*; *Taylor v. Gage* (1913), 30 O.L.R. 75, 16 D.L.R. 686; *Wigle v. Village of Kingsville et al.* (1897), 28 O.R. 378; *Cresswell v. The Etobicoke-Mimico Conservation Authority, supra*; *Donovan v. City of Belleville, supra*; *Re Foxcroft and City of London*, 61 O.L.R. 553, [1928] 1 D.L.R. 849.

*J. J. Robinette, Q.C.* (*W. G. C. Howland*, with him), for The Royal Bank of Canada, respondent: The controlling of municipal finances by the Municipal Board is an administrative function, and the Board is in pith and substance an administrative body: *Toronto Corporation v. York Corporation*, [1938] A.C. 415, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452. Section 23 of The Ontario Municipal Board Act did not require a public hearing in this case, since no demand was made for one. In comparing the language of ss. 65 and 69 with s. 66 one sees clearly that the Board may make such inquiries as it deems expedient. [AYLESWORTH J.A.: I suppose that if the Board were proceeding under ss. 65 and 69 and a public hearing were requested it would be bound to hold one?] Yes, I think that that interpretation is possible. Even when an administrative body is performing judicial functions it is not always bound to hold an oral hearing. There is no right at common law to such a hearing.

In any event, the Board in this case was dealing with matters of policy. It considered the representations made to it by the persons who complained. The issue of which the appellants really complain has never been decided against them, since the Board has not yet approved of the proposed method of retiring the debentures.

An alternative submission is that an order of the Municipal Board must be taken to be valid unless it is set aside; it cannot be questioned in proceedings such as this, where third parties are

involved: *Hollinger Bus Lines Limited v. Ontario Labour Relations Board*, [1952] O.R. 366, [1952] 3 D.L.R. 162.

We are entitled to recover where our money has been used to reduce legitimate debts of the municipality. [AYLESWORTH J.A.: Mr. Manning recognizes that line of cases, but his argument is that there was no legitimate debt.] There was no substantial deviation from the original plans and in any event no part of the bank's money was used to pay for the additional unauthorized work. This is not a problem of *ultra vires*. A municipal corporation has power to borrow money; the question is what is the effect of the absence of a by-law if there is evidence of the exercise of the corporation's powers. [AYLESWORTH J.A.: It is a question whether the power can be validly exercised otherwise than by by-law.] Yes. This was an executed contract. The bank advanced money. That being the case, no by-law was necessary. We are not suing on promissory notes. My submission is that considering the totality of the circumstances the Town is under a legal obligation to pay. What we seek is the return of our own property, our money. [AYLESWORTH J.A.: Are your pleadings framed in that way?] Yes.

The *John Mackay and Company* case, *supra*, was a common law action for services, and there was no acceptance by the municipal council. An executed contract is one where the benefit has been accepted by some corporate act. In the present case our money was clearly accepted by the council. I rely on the following cases:

*St. Michael's College v. The City of Toronto*, [1926] S.C.R. 318, [1926] 2 D.L.R. 244; *Armstrong v. The Township of West Garafraxa* (1879), 44 U.C.Q.B. 515; *The Molson's Bank v. The Town of Brockville* (1880), 31 U.C.C.P. 174; *Campbell v. Community General Hospital Almshouse et al.* (1910), 20 O.L.R. 467; *Wright v. City of Ottawa et al.* (1914), 7 O.W.N. 151, 19 D.L.R. 712; *McBain v. Township of Cavan* (1913), 5 O.W.N. 544, 25 O.W.R. 434; *Donovan v. City of Belleville*, [1931] O.R. 731, [1931] 4 D.L.R. 268; *St. Lawrence Rendering Company Ltd. v. The City of Cornwall*; *The City of Cornwall v. St. Lawrence Rendering Company Ltd.*, [1951] O.R. 669, [1951] 4 D.L.R. 790; *Witherspoon v. Township of East Williams* (1918), 44 O.L.R. 584, 47 D.L.R. 370; *The Waterous Engine Works Company v. The*



*Town of Palmerston* (1892), 21 S.C.R. 556; *Waterous Engine Co. v. Town of Capreol*, 52 O.L.R. 247, [1923] 3 D.L.R. 575.

When a municipality gets property, land or money the position is different from that where it has merely had services: *St. Michael's College v. The City of Toronto*, *supra*. The Town borrowed and received this money from us and hence we are dealing with an executed contract. In addition, our money was used to pay the Town's obligations to the contractors who supplied materials and did work, and was thus used in reduction of the Town's debts.

A borrowing by-law is not necessary where the performance of the work or the expenditure of the money is in pursuance of a statutory duty of the municipality. Here the Town was obligated to do the work and had to borrow the money in order to have the work done. We enabled the corporation, on which the statutory duty lay, to perform its duty: *Pratt v. The City of Stratford* (1887), 14 O.R. 260, affirmed 16 O.A.R. 5; *Armstrong v. The Township of West Garafraxa*, *supra*; *Bartlett v. The Municipality of Amherstburg* (1858), 14 U.C.Q.B. 152; *Taylor v. Gage* (1913), 30 O.L.R. 75, 16 D.L.R. 686; *Witherspoon v. Township of East Williams*, *supra*. I rely particularly on the *Witherspoon* case, where the judgment was delivered after consideration of the judgment of the Court of Appeal (43 O.L.R. 17, 43 D.L.R. 263), subsequently affirmed by the Privy Council, in the *John Mackay and Company* case, *supra*.

In any event, if a by-law was necessary to enable us to recover our money, By-law 312 authorized a borrowing, and was approved by the Municipal Board; this is sufficient: The Municipal Act, ss. 259(2), 307(4), 342, 362; *Hoyle et al. v. The Village of Long Branch*, [1947] O.R. 436, [1947] 3 D.L.R. 428, 89 C.C.C. 188.

Where money has been expended for the benefit of a municipality, or has been paid to it, under a contract (express or implied) that is beyond the powers of the corporation, the municipality must still account for the money: *County of Halton v. Township of Trafalgar*, 61 O.L.R. 45, [1927] 4 D.L.R. 134.

J. W. Carrick, Q.C., for Malvern Construction Company Limited, respondent: I adopt Mr. Robinette's argument.

H. E. Manning, Q.C., in reply: Neither mandatory orders nor the approval of the Municipal Board can excuse the defendant Town from enacting all necessary by-laws. Section 109(2) of

The Public Health Act expressly contemplates that the municipality will pass a by-law.

The by-law passed here merely provided for the issue of debentures. Anyone who complains to the Board automatically becomes a party to the proceedings and is entitled to be heard.

We are not suing for anything done under the by-law, but to prevent something being done. There are numerous decisions to the effect that where a by-law is bad on its face it is not necessary to take proceedings to quash it.

*Cur. adv. vult.*

29th June 1953. The judgment of the Court was delivered by

AYLESWORTH J.A.:—These three appeals, which were heard together, are taken from the judgments pronounced by Smily J. on 3rd July 1952, dismissing the action brought by Dilworth et al. against the respondents Town and bank, and in the action of the bank against the Town awarding the respondent bank judgment for the sum of \$83,767.40, including interest, and in the action brought by the respondent Malvern Construction Company Limited awarding that respondent judgment against the Town for \$10,582.80.

So far as the formal style of cause in these three appeals is concerned, the Corporation of the Town of Bala is respondent in the appeal brought by Dilworth et al. and is appellant in each of the other two appeals. As the position taken on behalf of the Town is in support of the appellants Dilworth et al., it will be convenient to refer to it in these reasons as an appellant.

The reasons for judgment of the learned trial judge set out with precision the main facts in the case, and they need not now be restated fully.

In the Dilworth et al. appeal certain ratepayers, suing on behalf of themselves and all other ratepayers, have brought suit against the Town and the bank which, if successful, would effectively and permanently prevent completion of the installation of the proposed sewage-disposal system and water-supply system in the town, both of which installations were well advanced before institution of the ratepayers' action, and would also prohibit payment by the Town of any further sums to the Malvern Construction Company Limited for its contract work and repayment to the Bank of the sums of money borrowed from

it by the Town and used by the Town to meet its obligations to the contractors for the installation of the two systems.

In the second action the respondent bank seeks to recover the moneys so advanced by it and so applied by the appellant Town, and similarly in the third action the respondent Malvern Construction Company Limited seeks recovery of the balance claimed payable to it for work done under its contract.

By a "Water Works Order" dated 28th January 1950 the provincial Department of Health reported in writing pursuant to what is now s. 109 of The Public Health Act, R.S.O. 1950, c. 306, that it was of the opinion that it was necessary, in the interests of public health, that a waterworks system be installed in the town of Bala. Under the same date it similarly reported under a "Sewerage Order" with respect to a sewerage system. These orders directed that the council of the town of Bala should forthwith pass all necessary by-laws for the establishment of the works reported upon, and that the corporation should immediately commence the work and carry it to completion without unnecessary delay.

Section 109 reads as follows:

"(1) Where the Department reports in writing that it is of opinion that it is necessary in the interest of the public health that a waterworks system or an adequate water purification plant, or a sewer or a sewerage system, or an adequate sewage treatment plant should be established or continued, or that any existing waterworks system, water purification plant, sewer or sewerage system, or sewage treatment plant should be improved, extended, enlarged, altered, renewed or replaced, it shall not be necessary to obtain the assent of the electors to any by-law for incurring a debt for any of such purposes.

"(2) Where the Department has reported as provided by subsection 1, the council of a municipality shall forthwith pass all necessary by-laws for the establishment of the works reported upon, and the corporation of the municipality shall immediately commence the work and carry it to completion without unnecessary delay.

"(3) The by-law shall not be finally passed until the approval of the Department has been obtained to the work to be done as hereinbefore provided and shall recite such approval."



Plans covering the works were duly submitted to the Department of Health and the works to be constructed were approved by that Department by certificates of approval dated 6th May 1950. Meanwhile, on 17th April 1950, By-law 312 of the Town of Bala received first and second reading, being a by-law providing for the borrowing on the credit of the Town of the sum of \$140,000 through the issue of debentures, in order to meet the cost of the proposed sewage-disposal and water-supply systems. On 22nd May 1950, upon the application of the appellant Town, the Ontario Municipal Board, pursuant to what is now s. 67(1) of The Ontario Municipal Board Act, R.S.O. 1950, c. 262, made an order approving of the proposed capital expenditure. Thereafter third reading was given to By-law 312 and it was duly passed on 6th June 1950 and registered in the appropriate registry office. After contracts with the respondent Malvern Construction Company Limited, and also with Marino Construction Company, were approved by resolutions of council and executed by the mayor and clerk, and the corporate seal of the Town was affixed, the construction work proceeded. Between October 1950 and April 1951 the appellant Town had borrowed from the respondent bank sums in excess of \$77,000 to pay for the work, pending issue of debentures under By-law 312. All the moneys borrowed from the bank were borrowed pursuant to resolutions of council under the hands of the Town's authorized signing-officers and it was all applied in payment of the contract work, pursuant to progress certificates of the engineer in charge and further specific resolutions of council. Matters thus proceeded until the work was halted by the Town and further payments were suspended, as a result of the action instituted by the rate-payers.

The appellants say that the judgment in appeal is in error in that the acts of the Town of Bala upon which it is founded were *ultra vires* because:

(a) No vote of the electors to authorize the undertaking of the works in question was ever taken as required by The Municipal Act, R.S.O. 1950, c. 243, s. 300(1) (formerly R.S.O. 1937, c. 266, s. 307(1)), and the taking of such vote was not excused under s. 300(3)(g) and (l) (formerly in s. 307(3)).

(b) No valid report under The Public Health Act, R.S.O. 1950, c. 306, s. 109(1) and (2) (formerly R.S.O. 1937, c. 299, s. 104(1)

and (2)), and no order of The Ontario Municipal Board dispensing with such vote was ever obtained.

(c) The alleged order of The Ontario Municipal Board referred to below was null and void by reason of the failure of the said Board to hear and determine the application for approval of the undertaking of the works in question and failure of the said Board to give to objectors who filed objections with the Board an opportunity of presenting their objections and of being heard; and

(d) No by-laws were ever enacted by the council of the defendant Town for the incurring of obligations in question in this action as required by The Municipal Act, s. 259(1) (formerly s. 267).

The appellants further argue that many diversions and omissions occurred in the actual construction work as contrasted with the specific works for which approvals were given by the Department of Public Health and that, therefore, the works constructed are not works done pursuant to s. 109 of The Public Health Act.

The learned trial judge refused to give effect to any of the appellants' contentions and in the view I take of the appeals I find myself in respectful agreement with him. I desire, however, to state in my own words the conclusions I have reached as to the effect upon the situation of the absence of any by-law or by-laws authorizing the respondent construction company's contract or specifically authorizing the borrowings from the respondent bank.

Strong reliance is placed by appellants on the decision by the Judicial Committee of the Privy Council in *John Mackay and Company v. The City of Toronto*, [1920] A.C. 208, 48 D.L.R. 151, [1919] 3 W.W.R. 253. That decision, it is said, unequivocally established for this Province the principle that the absence of an enabling by-law precludes recovery against a municipal corporation by a third party who deals in good faith with the municipal council, supplying for the benefit of the corporation moneys or services. It is argued that moneys or services supplied in the absence of a by-law dealing with the subject-matter never can be said to have been applied for the *lawful* purposes of the municipal corporation because, in the absence of a by-law, no *lawful* obligation is ever incurred. It is important to examine closely into the facts of the *Mackay* case in order to ascertain precisely

what required decision and therefore, so far as judicial precedent is concerned, what actually was decided.

The appellant in the *Mackay* case brought suit for services alleged to have been rendered to the City of Toronto. By special legislation the City had been empowered to acquire certain public utilities. The mayor, upon his own initiative, arranged with appellant to examine into the books of one such utility and to estimate the financial results if the City were to take over the utility and operate it. Appellant made an interim report and the city council ordered copies thereof printed. Payment for appellant's services was refused.

Viscount Haldane in delivering the judgment of the Judicial Committee stated at pp. 211-2: "The result of this evidence is to show that the appellant and the mayor were not really *ad idem* as to the terms on which the appellant was to be remunerated, and that when the appellant went on with the investigation as, up to a certain point, he did, he must be taken to have done so at best on the terms of being paid on the footing of establishing a claim to reasonable remuneration. But even on this footing the question remains whether he could establish any contract at all for his employment against the council."

This observation points to the first material difference in the facts between the *Mackay* case and the present appeals. In the *Mackay* case the appellant never had any dealings with the city council nor did the council in any way authorize the appellant's employment.

Their Lordships go on to state: "... it is far from clear that the contract here can be regarded as fully executed ... "

This, of course, is a further material difference from the facts in the present appeals. Furthermore, I observe that in the *Mackay* case the City was under no obligation to acquire the utilities in connection with which appellant made his interim report. In the instant appeals the respondent Town, on the contrary, was under a direct statutory duty and obligation to "immediately commence the work and carry it to completion without unnecessary delay".

The difficulty which arises in determining the proper application of the *Mackay* case really stems from the following passage which occurs in their Lordships' judgment at pp. 213-4:



"Again this corporation is not the creature of charter and as such endowed with capacity by the common law, but it is the pure creation of a statute. It may be that the effect of the Interpretation Act of Ontario (R.S. Ont., [1914] c. 1, s. 27), which gives to every corporation the power to contract, makes this power a general feature of its statutory equipment. But the section cannot affect the prohibition imposed by the Municipal Act of the exercise of its distinctive powers otherwise than by by-law under seal. Their Lordships do not desire to be understood as saying that the powers referred to in the context are to be taken as covering the whole field of the capacity of such a corporation to contract. It can hardly have been intended by the Legislature that, for example, notepaper cannot be bought for daily use except by a special by-law under seal; it may well be that the power to engage a servant is not a power ejusdem generis with the powers with which the Municipal Act is dealing when it imposes restrictions on their exercise. The language of s. 398, which enables by-laws to be made for providing for such minor appointments and for the carrying into effect of the council's own by-laws, appears to indicate that the power to make such appointments is distinguished from the special powers as to which the statute imposes restrictive formalities. But it is enough to point out that the new powers to acquire the undertaking of the Toronto Railway Company and the Electric Light Company, specially added by the two statutes of 1913 already referred to, assuming that they were sufficiently conferred, as an addition to those already in existence, belonged to the latter class. If so the judgments in the House of Lords in *Young v. Leamington Corporation*, 8 App. Cas. 517, show that the principle of *Clarke v. Cuckfield Union*, 21 L.J. (Q.B.) 349, has no application, inasmuch as there is an express statutory enactment prescribing conditions for the exercise of all powers of this nature."

I conclude that these observations, read and applied in the light of the precise facts with which their Lordships were required to deal, are not in terms to be given the sweeping effect for which appellants here contend. It may be that their Lordships intended to lay down as a principle of general application that even in the case of an executed contract with respect to which the council of the municipal corporation has formally by

resolution purported to obligate the municipal corporation, affixing its seal, and where the mayor and the clerk have executed the contract over the corporate seal, a by-law is a condition precedent to liability. But if so, and I am not sure that such actually was their Lordships' intention, then with the utmost deference I am of the opinion that the facts before their Lordships did not require that point to be decided. In coming to this conclusion I derive some comfort from the fact that "their Lordships [did] not desire to be understood as saying that the powers referred to in the context are to be taken as covering the whole field of the capacity of such a corporation to contract", and also from the fact that in the instant appeals the duty (not merely the power) imposed upon the Town is imposed not by The Municipal Act but by a separate public statute.

In our own Courts there are numerous decisions holding that a by-law is unnecessary in order to render a municipal corporation liable to pay for services fully performed or to repay moneys borrowed by it where the services were for its lawful benefit or the moneys so borrowed were expended for its lawful benefit, and where the dealings in question have been directly with the council, formally evidenced by resolution of the council and by the affixing of the corporate seal; reference need only be made to *Armstrong v. The Township West Garafraxa* (1879), 44 U.C.Q.B. 515; *Witherspoon v. Township of East Williams* (1918), 44 O.L.R. 584, 47 D.L.R. 370; *McBain v. Township of Cavan* (1913), 5 O.W.N. 544, 25 O.W.R. 434; and *Donovan v. City of Belleville*, [1931] O.R. 731, [1931] 4 D.L.R. 268.

Holding as I do that the *Mackay* case is completely distinguishable from the present ones, and adopting and applying as I do those authorities of which the above-cited four are examples, I hold that upon the facts in these appeals the absence of a by-law or by-laws is not a bar to recovery by the respondent bank and the respondent construction company.

The appeal by Dilworth et al. will be dismissed but, because of the position taken by the Town of Bala, with costs payable to the respondent bank but not to the respondent Town. The other two appeals will be dismissed with costs. In both instances in fixing counsel fees the taxing officer might well take into account the fact that all three appeals were argued together.

*Appeals dismissed with costs.*

*Solicitors for the plaintiffs Dilworth et al., appellants: Manning, Mortimer & Kennedy, Toronto.*

*Solicitors for the Town of Bala: Hossack, Wilson & Weaver, Toronto.*

*Solicitors for The Royal Bank of Canada, respondent: McMillan, Binch, Wilkinson, Berry & Wright, Toronto.*

*Solicitors for the plaintiff Malvern Construction Company Limited, respondent: Carrick & Weatherhead, Toronto.*

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[SPENCE J.]

**The City of London v. John Labatt Limited.**

*Taxation — Municipal Real Property Assessment — Exemptions — “Fixed machinery used for manufacturing purposes” — Brewery Equipment — Moving Parts not Required to Constitute Machinery — The Assessment Act, R.S.O. 1950, c. 24, ss. 1(i)(iv), 4(17).*

The plaintiff municipality claimed that certain equipment used by the defendant company in the process of manufacturing beer, which equipment consisted of various tanks, tuns, etc., held in place only by their own weight, was assessable and taxable.

*Held*, the equipment in question was exempt from assessment and taxation. Although it was clearly “structures” and “fixtures” within the definition of real estate in s. 1(i)(iv) of The Assessment Act, as interpreted in *Hiram Walker & Sons Limited v. The Town of Walkerville*, [1933] S.C.R. 247, and *The Northern Broadcasting Company v. The Improvement District of Mountjoy*, [1950] S.C.R. 502, it was exempt under s. 4(17) of the Act as “fixed machinery used for manufacturing . . . purposes”. It was not necessary, to constitute machinery, that there should be moving parts in the equipment: the *Mountjoy* case, *supra*, at p. 509. The tuns and tanks were means and appliances whereby the liquid was kept in action and the desired result of the manufacture of a potable beer was obtained, and while it was true that the action was essentially chemical rather than mechanical, mechanical means were employed to obtain this chemical result. The American decisions uniformly interpreted the word “machinery” more broadly than the word “machine”, and so as to include any appurtenances necessary for the working of a machine.

AN ACTION for arrears of taxes.

8th and 9th June 1953. The action was tried by SPENCE J. without a jury at London.

*H. R. Davidson, Q.C.*, for the plaintiff.

*E. S. Livermore, Q.C.*, for the defendant.

21st August 1953. SPENCE J.:—This is an action in which the municipal corporation sues for the sum of \$24,794 for arrears of taxes alleged to be due by the defendant company for the year 1952 and interest thereon in accordance with the provisions of The Assessment Act, R.S.O. 1950, c. 24.



The plaintiff corporation proved its case by submitting as ex. 1 a certified copy of the collector's roll for the year 1952, relying upon the provisions of s. 99(1) of The Assessment Act to the effect that production of such certified copy shall be *prima facie* evidence of the debt.

The company defends on two grounds: firstly, that the property assessed, and upon which the said taxes are said to be due and owing, is "fixed machinery used for manufacturing . . . purposes" and therefore exempt under the provisions of s. 4(17) of The Assessment Act; and secondly, in the alternative, if the said property is held not to be "fixed machinery", then it is not part of the real estate subject to assessment as defined in s. 1(i) (iv) of The Assessment Act, for, it is alleged, it is not "structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land".

It would be better to deal first with this alternative defence. Whether or not the devices and equipment to which I shall refer subsequently in detail are "machinery", certainly I am of the opinion that they are "structures" and "fixtures" within s. 1(i) (iv). "Structure" is defined in the Shorter Oxford English Dictionary as *inter alia*, "that which is built or constructed; a building or edifice of any kind . . . a fabric or framework of material parts put together". The word is so broad in its connotation that Aylesworth J.A. in *The Northern Broadcasting Company Limited v. The Improvement District of Mountjoy*, [1949] O.R. 695 at 702, [1949] 3 D.L.R. 739, affirmed [1950] S.C.R. 502, [1950] 3 D.L.R. 721, remarked that "a chair is a structure".

In *Hiram Walker and Sons Limited v. The Town of Walkerville*, [1933] S.C.R. 247, [1933] 3 D.L.R. 433, Smith J. held that a series of racks 173 feet long by 142 feet wide and 86 feet high, designed and erected for the purpose of holding barrels containing whisky so that the whisky might mature, was a structure. It would seem certainly that the word "structure" is sufficiently broad to cover the equipment to which I shall refer in detail and which was the subject of the assessment.

Moreover, as pointed out by Kellock J. in the *Northern Broadcasting Company* case in the Supreme Court of Canada, *supra*, at p. 509, a property, to come within the words of the extended definition of real estate need not be affixed to the realty so as to

form part thereof in accordance with the test applicable at common law, because the statute has used the three words "erected, placed and affixed" and it is sufficient if the particular piece of property has been set in a particular position "with some idea of permanency".

Therefore I think it is irrelevant that the various tuns and tanks which are the subject of this assessment are not fastened to the framework of the building but merely sit by their own weight. The weight of the various tanks is enormous, according to the evidence given by the production manager of the defendant company, varying from 2,750 pounds empty to 15,000 pounds empty. In many cases containers are so large that they extend through from one floor of the building to another. None of the containers could be removed from the building without dismantling either the building or the containers, and apart from any connection of the various containers by pipelines or hoses, they are certainly settled in the building with the idea of permanence and are, therefore, within the word "placed" appearing in the definition. Therefore, unless these tuns and tanks are "fixed machinery used for manufacturing purposes", and so exempt under s. 4(17) of The Assessment Act, they must be held to be part of the real estate subject to assessment.

The problem therefore is resolved simply into whether the tuns and tanks were "fixed machinery used for manufacturing . . . purposes". It would appear appropriate to outline in some detail the equipment in question. It consists of a series of containers called, variously, chill water or brine-tanks, settler-tuns, processing-tanks and bottling-tanks. The production manager in his evidence referred to a "flow chart", ex. 2, and described the progress of the material through the various stages of manufacture, from its entry into the plant from a box-car to its bottling and final dispatch from the bottling-works as beer, either ale or lager. For this purpose, it is sufficient to commence the outline of that process with the fluid, then known as a wort, when it leaves the brew-kettle. It flows through the hop-strainer, wort-receiver and wort-cooler into a receptacle or container shown on the "flow chart", ex. 2, as the settling-tank and described during the course of the trial as being a chill water or brine-tank. Three of these tanks are shown in the photograph ex. 3. There are, in all, five of wood and two of mild steel. The wort flows into these

tanks and is there cooled by a cooling liquid running through a series of pipes set into the tanks. Such pipes are shown in the interior view of the tank, ex. 4. The cooling liquid may be either salt water or ammonia and the cooling liquid is pumped into the tanks by the two pumps shown in ex. 5. During the period in which the wort remains in these cooling-tanks, fermentation is taking place and that fermentation is controlled by the cooling liquid running through these pipes set into the tanks. The cooling liquid is compressed in compressors elsewhere in the building and the same compressors operate to prepare the cooling liquid both for these cooling-tanks and for the settler-tuns to which I shall refer. The wort is taken from this cooling-tank into settler-tuns of two types, one for ale shown in photograph ex. 6, and one for lager shown in photograph ex. 7. The connection by which this wort flows from the cooling-tank to the settling-tun is a hose which may be detached and moved from place to place. The hose is connected to a pump. The pumps may be either stationary or on wheels so that they may be moved from place to place. Such a portable pump is shown on the floor in photograph ex. 12. The two types of settler-tun are very similar except that in the case of those for the manufacture of ale the tun is open at the top, while those used for the manufacture of lager are closed. Exhibit 10 shows a photograph of the open ale-fermenting or settler-tuns. In these tuns the yeast is added and the process of fermentation continues, expedited by the yeast but regulated and held by the cooling. The cooling in these cases is obtained by the affixing around the inside lining of the tun of a pipe through which the same refrigeration material is pumped. The yeast, when it has done its work, is skimmed off the top down a chute attached to the side of the tun. Exhibit 11 is a photograph showing the inside of the tun with the mixture which will be beer at the bottom of the tun, the two rows of pipe containing the cooling liquid above that and the chute for skimming off the yeast at the top of the tun. The beer is pumped in and out of the tun through the same type of large hose to which I have referred. Having remained in the fermenting-tun about one week the liquid is pumped out of this fermenting-tun into the processing-tanks. These tanks have been referred to as storage-tanks but the production manager of the defendant company said such a designation was misleading as the liquid when it enters the



processing-tanks is not yet potable and must have the treatment which it receives in those tanks before it can be potable. In other words, an integral part of the manufacturing of the beer, as distinguished from its storage or its subsequent handling, is carried on in the processing-tanks. These tanks are shown in photographs exs. 13 and 14. The tanks are of steel and are completely enclosed. There compressed air is pumped into these tanks through pipe-lines shown in the photograph ex. 15. The liquid must be kept under this pressure to become a potable beer and stands from four to six weeks in two different stages of processing while carbonization, etc., takes place. From these processing-tanks the beer is pushed out by air-pressure into bottling-tanks, such as are shown in photographs exs. 16 and 17, again passing through the same type of rubber hose, although sometimes when the beer has to travel some distance a line of copper pipe affixed to the building is used, the rubber hose being used at either end of that copper pipe to connect with the tanks from which and into which the beer is to flow. The bottling-tanks are situated close to, but not necessarily in the immediate proximity of, the bottling-machine, and the bottling-tanks are again under pressure. The production manager said that these were an integral part of the bottling-machine. With that view I agree, as I do not see how a bottling-machine could be considered complete without the tank of the fluid to be bottled held under a pressure which is regulated by the operator of the bottling-machine. For this reason alone I would hold that the bottling-tanks were an integral part of the bottling-machines and were therefore "fixed machinery used in the manufacture" of the finished product, bottled beer.

Are these tuns and tanks, even apart from the ultimate connection of the bottling-tanks with the bottling-machine, "machinery" used for manufacturing purposes? The notion that in order to come within the word "machinery" the equipment must have moving parts was refuted by Kellock J. in *The Northern Broadcasting Company Limited v. The Improvement District of Mountjoy*, *supra*, at p. 509, where, dealing with the same section, he found that it contained its own dictionary and that by removing from the exemption created, boilers, which of course have no moving parts, the section must mean that moving parts were not a requisite to constitute "machinery". In that case the Supreme

Court of Canada held that a transmitter and a transformer installed by the taxpayer in a building simply by their own weight, were "fixed machinery" but of course, since that machinery was not used in the process of manufacturing, it was not within the exemption.

In reaching this conclusion, the Court considered a definition of "machinery" found in the Oxford Dictionary, "any instrument employed to transmit force or to modify its application", and found that the transmitter and the transformer either transmitted force — *i.e.*, electric energy — or modified its application.

Webster's New International Dictionary, 2nd ed. 1948, contains an alternative definition which would seem quite reasonable: "the means and appliance by which anything is kept in action or a desired result is obtained."

There are no moving parts in the actual tuns or tanks, although of course there are such moving parts in the compressors and pumps which generate and force into the pipes about the tanks the cooling liquid and there are moving parts in the pumps connected from time to time with the various tuns and tanks in order to conduct the liquid from one of them to the other. Even if such moving parts are not a component part of the equipment, the Supreme Court of Canada has held in the *Northern Broadcasting* case, *supra*, that the absence of moving parts is not fatal to the classification of the equipment as "fixed machinery". The tuns and tanks are means and appliances by which the liquid is kept in action and the desired results of the manufacture of a potable beer is attained. Counsel for the plaintiff corporation points out that the action is essentially chemical, not mechanical. This is true, but there are mechanical means employed to obtain the chemical result. Such mechanical means are the forcing of cooling liquid through the pipes in the cooling-tank and settling-tuns, and in the cooling of the room in which the processing-tanks stand and also in the forcing of compressed air into the processing-tanks and the bottling-tanks, forcing of carbon dioxide into the processing-tank and the pumping of the liquid from one tank to another. In my opinion, the result is obtained by a combination of mechanical means and chemical processes.

It is true that in *Chamberlayne v. Collins* (1894), 10 T.L.R. 233, Davey L.J. said if it was safe to venture on a definition, he

would define machinery to be "the adaptation of mechanical means to a particular end by the application of natural forces". But there the Court was considering a switchback railway, a thing which was obviously mechanical, and was not required to consider any chemical element.

It is perhaps significant that in the Queen's Bench Division many years before, in *Regina v. Haslam and Howarth* (1851), 17 Q.B. 220, 117 E.R. 1264, the Court considered very large sulphuric acid vats, held down only by their own weight but attached by pipe-lines, etc., to a building where the action was, as here, in essence chemical, assisted by mechanical means, and Patteson J., giving the judgment of the Court, said at p. 228: "It is, however, plain from the facts stated that they [the vats] are used as part of the fixed machinery of the works, attached to the other buildings for the purpose of being so used."

Some judgments in the Courts of the United States give considerable assistance. The word "machinery" has been uniformly interpreted to have a much broader connotation than the word "machine", and to include any appurtenances necessary for the working of the machine: *Benedict v. City of New Orleans* (1892), 11 S. 41; *Seavey et al. v. Central Mutual Fire Insurance Company* (1873), 111 Mass. 540 at 541; *Shaleen et al. v. Central Coal & Coke Co.* (1917), 192 S.W. 225 at 227.

A sewer was held to be "machinery" so that it might be subject to a lien for work done in *Worden-Allen Co. v. Wisconsin Tunnel & Construction Co.* (1920), 176 N.W. 877 at 878; and a smoke-stack was held to be included in the class of "machinery" in *Wreggitt v. Barnett* (1894), 58 N.W. 467. A pot or kettle in which molten zinc was poured, part of the equipment or plant used for galvanizing sheets of metal, was held to be "machinery" in *National Enameling & Stamping Co. v. Zirkovics* (1918), 251 F. 184 at 189.

It is perhaps irrelevant to speculate on the intent of the Legislature, but it is hard to understand why the Legislature, in approving an exemption freeing from taxation equipment used for manufacturing purposes, would intend that manufacturing by mechanical devices would result in an exemption and manufacturing by chemical processes would fail to be accorded any exemption.



Although in construing an exemption one must remember that the burden is shifted upon the person claiming its benefit and that person must prove all the facts necessary to bring him within the exemption: Manning on Assessment and Rating, 3rd ed. 1951, p. 29, I am of the opinion that the defendant company has proved that the various tuns and tanks are "fixed machinery used for manufacturing . . . purposes" and that they are therefore exempt from assessment and taxation under s. 4(17) of The Assessment Act.

The action will therefore be dismissed with costs.

*Action dismissed with costs.*

*Solicitor for the plaintiff: H. R. Davidson, London.*

*Solicitors for the defendant: Ivey, Livermore & Dowler, London.*

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[SPENCE J.]

**Reliance Petroleum Limited v. Stevenson.**

**Reliance Petroleum Limited v. Canadian General Insurance Company.**

*Insurance — Liability Insurance — Settlement of Claims by Insured — Prior Repudiation of Liability by Insurer and Refusal to Take Part in Investigations or Negotiations.*

If an insurer, having covenanted in a liability policy to serve the insured by investigating all claims and defending all actions, wholly repudiates liability following a loss, on the ground that the loss is not within the peril insured against, it cannot afterwards, in defence to a claim by the insured, rely upon a term of the policy prohibiting the insured from settling claims or assuming any liability without the consent of the insurer. If the settlement made by the insured is found by the Court to be reasonable such a defence cannot succeed, because it is the insurer's failure to perform its covenant that requires the insured himself to negotiate. *Jureidini v. National British and Irish Millers Insurance Company, Limited*, [1915] A.C. 499, applied; *Heyman et al. v. Darwin's Limited*, [1942] A.C. 356, distinguished; other authorities reviewed. If, in such circumstances, it is found that the claims made against the insured, and settled by him, were within the coverage, the insured will be entitled to recover from the insurer not only the amounts of the claims and costs paid to third persons, but also costs paid by him to his own solicitors for their services in investigating and defending the claims.

*Insurance — Automobile Liability Policy — Loss Arising from "ownership, use or operation" of Vehicle — Tank-truck Delivering Gasoline at Service-station.*

One A, an employee of a company engaged in the business of distributing petroleum products, was delivering gasoline from a tank-truck at a service-station when a fire broke out as the result of A's negligence. Extensive damage was done to the service-station and property there-

in, and claims were made against the company, which claimed indemnity from its insurer under a policy against, *inter alia*, liability for loss or damage "arising from the ownership, use or operation" of the tank-truck.

*Held*, the loss was within the coverage of the policy. It did not arise from the ownership of the vehicle, since the insured's liability for A's negligence would have been the same if someone else had owned the tank-truck. Nor did it arise from the "operation" of the vehicle, since that word must be confined to driving or mechanical operation. *O'Reilly v. Canada Accident and Fire Insurance Co. Ltd.* (1929), 63 O.L.R. 413 at 416, applied. It did, however, arise from the "use" of the vehicle, since there could be no more natural meaning of the word "use", as applied to a tank-truck, than the delivery of gasoline from the truck to a service-station. *Honan and Honan v. McLean and McLean* (1952), 7 W.W.R. (N.S.) 337, affirmed 8 W.W.R. (N.S.) 523; *Dokuchia v. Domansch*, [1945] O.R. 141; *Dokuchia v. St. Paul Fire & Marine Insurance Company*, [1949] O.R. 170, considered; American decisions discussed.

TWO ACTIONS for indemnity under policies of insurance.

15th and 16th June 1953. The actions were tried together by SPENCE J. without a jury at London.

*E. S. Livermore, Q.C.*, for the plaintiff.

*E. L. Haines, Q.C.*, for the defendant Stevenson.

*R. F. Wilson, Q.C.*, for the defendant Canadian General Insurance Company.

4th September 1953. SPENCE J.—These are two actions which, by agreement of counsel, were tried together as the evidence was equally applicable to both.

The first action is one against the attorney in Canada for the Non-Marine Underwriters at Lloyd's and is an action based on a policy of automobile insurance at Lloyd's originally insuring McManus Petroleums Limited, and then assigned to the plaintiff company, together with an excess limits policy whereby the coverage for property damage was increased from \$5,000 to not more than \$45,000. These two policies were produced at trial and were identified as exs. 7 and 8. For the purpose of this judgment, it is sufficient to quote the agreement to indemnify from ex. 7, omitting the irrelevant parts, as follows:

"The Insurer agrees to indemnify the Insured . . . against the liability imposed by law upon the Insured . . . for loss or damage arising from the ownership, use or operation of the automobile within Canada . . ."

The plaintiff's action against Canadian General Insurance Company is based on a general public liability policy including a property damage endorsement. Such policy was produced at trial and identified as ex. 6. For the present purpose it will be

sufficient to quote relevant parts of the covenant in the endorsement as follows:

"To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon the Insured by law, or assumed by the Insured under contract as set forth hereinafter, for damages because of injury to or destruction of property caused by accident occurring within the Policy Period and while this Endorsement is in force."

Actions were instituted under the following circumstances:

On the 1st September 1951 a tank delivery-truck owned by the plaintiff was driven by its servant, Harold Anstey, upon a service-station lot in order to deliver from the truck gasoline of two different types which had been ordered in a telephone conversation between Anstey and Ronald Riddell, the operator of the service station. According to such operator Anstey stopped the truck, took a hose from along the side of the five gas-tanks which the truck bore, and connected that hose with a faucet, one of a row of five, one for each of the said tanks, which were situate along the rear of the tank-truck and, opening the underground tank on the service-station lot, inserted his hose in that tank and then, by opening the faucet on his tank-truck, allowed 200 gallons of ethyl gasoline to run into that underground tank from the tank on the truck. He then shifted the hose to another tank on the tank-truck, by connecting the hose to a faucet on the tank-truck connected with a tank in which standard gasoline was carried, and shifted the other end of the hose into the appropriate underground tank on the service-station lot for the storage of the latter type of gasoline and, again opening the faucet, permitted 150 gallons of that standard gasoline to run into the underground tank. Anstey swore that, in the telephone conversation between himself and Riddell, the latter had ordered 400 gallons of this standard grade of gasoline and when the first tank on the truck was able to supply only 150 gallons, he disconnected his hose from the faucet for that tank and connected it with a second tank on the tank-truck, also carrying the same standard grade of gasoline, and again opened the faucet, intending to permit another 250 gallons of that standard gasoline to flow into the underground tank on the service station lot. Riddell admitted in evidence that he believed that he did order 400 gallons of standard grade gasoline.



Anstey, prior to assuming his duties as driver of the tank-truck, had received a course of instruction which took the form of a direction by an official to Anstey to accompany another experienced driver for a period of two weeks and do what that driver did. He admits that he was instructed always to ascertain the amount of gasoline already in an underground tank before connecting a tank on his tank-truck and allowing more gasoline to flow into the underground tank. This was done by using a dip-stick which was inserted into the underground tank, and then comparing the gasoline-level shown on the dip-stick with a scale which was printed and fastened at the rear of the tank-truck. Anstey admits that he did not check the underground tank with the dip-stick on this occasion.

The faucets on the back of the tank-truck are operated by a spring mechanism so that the faucet cannot be opened and left open but must be held open. The regulations made under The Gasoline Handling Act. R.S.O. 1950, c. 156, require such a type of faucet. Regulation 20(4) of these regulations provides that every driver or other person in charge of a tank-truck shall remain at the faucets of such a tank-truck when discharging the contents of the tank. A copy of these regulations was produced at trial and identified as ex. 1. Anstey stated that he had not written instructions that he should not leave the faucets when gasoline was being delivered, but that the other driver, under whom he had taken a course of instruction, had said it was his duty not to leave the truck, but rather to stand close to the rear of it. Of course, the type of faucet required by the regulations, and with which this vehicle was equipped, was designed to require the operator to stand and hold the faucet, but this driver (and I suppose a very large percentage of the drivers of these tank-trucks) was equipped with a handy piece of wood which he could press against the faucet so as to hold it open without his having to keep his hand pressing against the handle. Anstey swore that the senior man who gave him the two weeks' course of instruction had a similar piece of wood on the truck during that two weeks' period.

Anstey did leave the faucets and seems to have left them on several occasions. Riddell states that when the gasoline was still being delivered, Anstey came into the service-station where Riddell was underneath a car repairing it and requested Riddell

to give him the cheque to cover the cost of the gasoline being delivered, and he, Riddell, directed Anstey to have Riddell's stepson, who was about the service-station and his employee thereon, prepare the cheque and bring it to Riddell, who would sign it. Anstey states that he went to speak to the stepson of the service-station operator at a restaurant or snack-booth near the service-station and on the service-station lot which is shown in photographs exs. 2 and 5, and that in fact he went to the rear door thereof, not shown in either of the photographs, in order to take the cheque from the stepson.

Anstey alleges that from that point he could always see the truck and he suddenly noticed that the gasoline was overflowing from the underground tank, which had evidently contained much more gasoline than either Anstey or Riddell realized and which therefore had filled before the 250 gallons, which Anstey intended to put therein, had run into the tank. Anstey swears that he rushed the 15 to 18 steps back to the truck, knocked out the stick which was holding open the faucet and walked toward the open door of the service-station. This was a door about 10 feet wide, and, perhaps due to some slight slope of the land, the escaping gasoline had flowed through the door. When he was only a few feet from that door, he noticed a wall of fire and of course it is evident that this escaping gasoline flowing across the doorway of the garage, and into the garage, had become ignited. It would appear that the actual agent which ignited the gasoline will never be known. Riddell swears that he was not using anything inflammable in his repair of the automobile under which he lay and that nothing inflammable was within 30 feet of him, but a salesman had been speaking to him only a moment before and might have been smoking. The day was a hot one, the gasoline would vapourize quickly and even the spark of a tool against a metal object would have been sufficient to cause the explosion. In spite of the efforts of both Riddell and Anstey, and others, with fire-extinguishers, the resultant fire destroyed the service-station and its contents, including a large stock-in-trade and several automobiles which were being repaired, their contents and some other equipment such as tires.

On the next day, or very soon thereafter, the agents for both of the defendants were notified of the fire and from time to time as each claim for compensation was made against Reliance Pe-

troleum Limited the two defendants were notified of each of these claims, the writs issued were forwarded to them in the usual course and they were kept notified completely of all steps taken by the plaintiff company. Both insurers denied liability. The defendant Stevenson (Lloyd's) denied liability on the ground that the loss did not arise "from the ownership, use or operation of the automobile". The defendant Canadian General Insurance Company denied liability on the allegation that the claim was within two different exclusions which will be stated particularly hereinafter. Both policies, in addition to the covenant to pay, contained the usual covenants to serve the insured by the investigation of the claims at the cost of the insurer and to defend any writ. Acting wisely, the defendant Stevenson (Lloyd's), in spite of his denial of liability, entered into what is known as a non-waiver agreement, produced at trial and identified as ex. 32, whereby the parties agreed that the investigation and settlement of the claims could proceed without such action constituting either an admission by the insurers (Lloyd's) that they were liable under the policy or any estoppel.

The local investigator for Lloyd's, Mr. Joseph B. McDonnell, took up the investigation of the claims and proceeded to advise on their investigation and settlement throughout, acting always in concert with Mr. Edward A. Reid, secretary of the plaintiff company and its solicitor. Mr. Walter A. Jennings, who was at the time of the accident the Ontario claims manager of the defendant Canadian General Insurance Company and is now general claims manager of that company, stated that he has known Mr. McDonnell for 25 years and is a close personal friend, that Mr. McDonnell acts as adjuster on the London district claims of his company, and that he knows him to be a very efficient adjuster. The defendant Canadian General Insurance Company was urged to enter into the same non-waiver agreement and was urged to approve of the amounts which it was proposed should be paid to the various persons with claims against the plaintiff. In his evidence, Mr. Jennings stated that he was in favour of that procedure but that his recommendation was not accepted by his superiors, with the result that the solicitors for the defendant Canadian General Insurance Company wrote to the plaintiff a letter dated 10th March, produced at trial and identified as ex. 13. In that letter, the said solicitors deny and completely refute any



agreement to permit the settlement of the claims on a non-waiver basis and in the final paragraph they say:

“In order that there will be no misunderstanding about the position of the Canadian General Insurance Company under General Liability Policy No. 8B5564, we want to put on record that any steps taken by Reliance Petroleum Limited by way of settlement of the various claims by consent judgments or otherwise will be challenged by the Insurer, if such action in any way contravenes the terms and conditions of the said policy.”

The policy, ex. 6, under which the defendant Canadian General Insurance Company is sued contains the usual provision no. 3 under “Special Conditions” providing in its relevant parts:

“No action by any person shall lie against the Insurer unless, as a condition precedent thereto, the Insured . . . shall have fully complied with all the terms and conditions of this Policy nor until the amount of the Insured’s obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Insurer . . .”

The defendant Canadian General Insurance Company, as well as defending upon the ground of the exclusions aforesaid, defends on the ground that it made no agreement with the plaintiff insured and the claimants and that the claims paid by the insured are not such as were determined “after actual trial”.

Two of the claims—those of Ronald Riddell and John Gardiner—were upon judgments of the High Court made after minutes of settlement were filed. Certified copies of these two judgments were produced at trial as exs. 14 and 15. The third claim—that of Joseph Mordush—was upon a judgment of the County Court of the County of Middlesex dated the 8th March 1952, based also upon minutes of settlement. Then followed, in time, the letter from the solicitor of the defendant Canadian General Insurance Company to the plaintiff, ex. 13, to which I have referred, and then the actions of Raymond Finnemore and Roddy L. Morrison came before the High Court for trial together and on the 25th June 1952 judgments were given in favour of each of them. Certified copies of these judgments are produced, exs. 17 and 18, and in each of these cases the plaintiff here, as defendant in the action, had entered a defence and was represented by counsel at the trial who cross-examined the witnesses

produced by the plaintiffs and then, at the close of the plaintiff's case, stated: "I am offering no defence. . . . On behalf of both defendants I am simply submitting our rights to the Court." Judgment was delivered orally at the conclusion of the trial and the defendant there—that is the plaintiff company in this action—was found liable for the negligence of its servant, Anstey. The evidence at trial and reasons for judgment have been produced and have been identified as ex. 44.

The claim of Frank Dalton came before the County Court of the County of Middlesex on the 23rd October 1952 and evidently the procedure was the same as that of the High Court in the two cases just dealt with. A certified copy of the judgment of the County Court was produced at trial and identified as ex. 19.

The claim of John Thompson came before the First Division Court of the County of Middlesex on the 30th June 1952 and evidently a similar procedure was again adopted. A certified copy of the judgment of the First Division Court of the County of Middlesex was produced at trial and identified as ex. 20.

Mr. Joseph B. McDonnell has sworn that in each case the amount of the judgment was agreed upon between the solicitors for the various claimants and himself and Mr. Reid before the judgments—whether they were upon the consent minutes of settlement or after the procedure which I have outlined—were obtained. He has sworn that in each case they were reasonable settlements, in fact, in the case particularly of John Gardiner, the settlement was for a small portion of what would seem to have been the inevitable result of a contest. In the case of Ronald Riddell the judgment was for \$3,000 and costs of \$337.50 while Riddell had claimed for over \$5,000 loss of stock-in-trade and had an inventory which he could prove of \$4,500 and in addition had been out of possession of the service-station for a long period so that his claim for loss of business was considerable.

Counsel for the defendant Canadian General Insurance Company, in supporting the defence based on the failure to defend each of these claims in actual trial, urged that the claim of Ronald Riddell was certainly subject to a defence of contributory negligence in that on the evidence of Anstey, Riddell had ordered 400 gallons of standard grade gasoline while in fact his underground tank could not take nearly that amount. Certainly there

is every evidence that had the Riddell claim been prosecuted vigorously at trial judgment in his favour would have been for a much larger amount than \$3,000 and no allowance of any percentage for contributory negligence by Riddell, had the Court found such contributory negligence (which I very much doubt), could have reduced his recovery nearly to \$3,000. That such contributory negligence was considered is evidenced by the fact that Riddell's solicitors were with some considerable difficulty persuaded to recommend a settlement for \$3,000 only, and as a term thereof demanded and obtained from the plaintiff the plaintiff's agreement to indemnify Riddell against claims which might be made against him by any of the other claimants.

Being of the opinion that such a finding is required under the law applicable to the situation, I find as a fact that each and every one of the amounts paid by the plaintiff was a reasonable and proper payment of a loss actually sustained by the particular claimant. I think perhaps Mr. McDonnell's testimony is most persuasive, for he says that if Lloyd's had been liable upon the policy, he would have recommended a payment of such amounts and done so with alacrity and relief.

It may seem appropriate to dispose of this defence of the defendant Canadian General Insurance Company at this time. It has been pointed out that by the policy issued by that defendant it covenanted to serve the insured by the investigation of claims and the defence in the name and on behalf of the insured of any suit against the insured, and in my opinion it was the defendant's failure to carry out these covenants in this policy which required the plaintiff to take the action it did take and so long as the settlements were reasonable, the defendant cannot rely on its failure to carry out its covenants to refute the claim of the plaintiff.

In *Jureidini v. National British and Irish Millers Insurance Company, Limited*, [1915] A.C. 499, the House of Lords dealt with the following situation: The insurer had issued a policy on a stock of goods in a store in Costa Rica. The policy of course contained the provisions usual in fire policies negating any liability if the fire resulted from arson or incendiarism and in addition contained a provision which made it a condition precedent to the bringing of an action against the insurer that the amount of the claim, if there should be any dispute as to it,



should be settled by arbitration. The insurer denied liability on the plain ground that the fire arose as the result of arson and incendiarism. The insured took action without going to arbitration as to the amount of the loss, and the insurer in that action failed to support its allegations of arson and incendiarism.

The House of Lords had to determine whether the failure to have the amount of the loss arbitrated prevented the insured from taking its action. Viscount Haldane, at p. 505, said: "Now, my Lords, speaking for myself, when there is repudiation which goes to the substance of the whole contract, I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced." With his judgment, Lord Dunedin, Lord Parker of Waddington and Lord Parmoor concurred.

The decision has been somewhat criticized in *Heyman et al. v. Darwins, Limited*, [1942] A.C. 356, [1942] 1 All E.R. 337, where the House of Lords were considering an arbitration clause which provided that any difference or dispute that might arise in respect of or in regard to or under the contract should be referred to arbitration, and the House of Lords there found that such a broad clause of arbitration did prevent an action when the parties had agreed that there was a binding contract in effect, even when the subject-matter of the action involved an assertion by one party that circumstances had arisen which had the effect of discharging that party from all subsequent liability under the contract.

I think that the criticism in the latter decision must be limited to the actual circumstances involved therein, that is, a very broad arbitration clause, and cannot be considered as being an attack on Viscount Haldane's broad principle that if one party repudiates the whole contract, he cannot be entitled to insist on the performance of a subordinate part of it by the person against whom he seeks repudiation *in toto*.

*Jureidini v. National British and Irish Millers Insurance Company, Limited*, has been followed in the Court of Appeal in Alberta in *Chamberlain v. North American Accident Insurance Company* (1916), 9 Alta. L.R. 538, 10 W.W.R. 686, 28 D.L.R. 298, and in Manitoba in *Wood v. Armstrong*, [1931] 2 W.W.R. 359, [1931] 3 D.L.R. 321.

The same result was reached in the Supreme Court of the United States in *St. Louis Dressed Beef and Provision Company v. Maryland Casualty Company* (1906), 201 U.S. 173. In the latter case the circumstances were quite similar to those in the present case. The insurer issued a policy agreeing to indemnify the insured against liability for loss through accidental injury of third persons. Such a claim was made and the insurer denied liability and refused to defend the action on behalf of the insured on the ground that the claim was not within the risk covered in the contract. The insured, faced with the probability that very heavy damages would be recovered in the action, made a modest and reasonable settlement. The Supreme Court of the United States held that the defendant insurer's failure to carry out its covenant to investigate and defend had forced the plaintiff insured into either risking the defence of an action and possibly a heavy verdict, or making a reasonable settlement, and since the settlement was reasonable the defendant could not rely on its own failure in this defence.

In our Ontario Courts, the failure to file proof of loss has been excused on several occasions when the defendant insurer had repudiated liability altogether: *Battle v. Fidelity and Casualty Co. of New York* (1923), 54 O.L.R. 24, affirmed 55 O.L.R. 330; *Beury v. Canada National Fire Insurance Co.* (1917), 38 O.L.R. 596, 35 D.L.R. 790, affirmed 39 O.L.R. 343, 37 D.L.R. 105; and *Magrath v. Sydenham Mutual Fire Insurance Co.*, 24 O.W.N. 287, [1923] 3 D.L.R. 44.

Therefore, without having to determine whether or not what occurred in the Finnemore, Morrison, Dalton, Thompson and Mordush cases did constitute an actual trial, I find against the defence of the Canadian General Insurance Company for the reason that I am of the opinion that its complete denial of liability, relying on the exclusions of the policy, excused the plaintiff from defending each claim to trial and running the risk (in this case, the certain risk as to several of the claimants) of much heavier verdicts for damages and for costs.

Therefore I propose next to consider the defence of the defendants Stevenson (Lloyd's) and Canadian General Insurance Company based upon the provisions of the contract other than the provisions as to defence of claims with which I have already dealt.

The defendant Stevenson (Lloyd's) defends simply on the ground that the loss did not arise "from the ownership, use or operation of the automobile". I do not think there can be much doubt that the situation is not covered by the word "operation". At the time of the fire, the truck had been standing with its motor turned off for some considerable period, and I think that "operation" in such a contract of insurance is confined to the driving or mechanical operation of the actual vehicle: *O'Reilly v. Canada Accident and Fire Insurance Co. Ltd.*, 63 O.L.R. 413, [1929] 2 D.L.R. 70, per Hodgins J.A. at p. 416.

I do not understand how any liability would arise through the ownership of the vehicle, since Anstey's negligence would have been just as actionable and, when that negligence occurred in the course of his duties, his employers would have been responsible, if the tank-truck had been owned by a third person.

The question whether the loss arose during the "use" of the vehicle is, however, very different. The vehicle was a tank-truck used for the business of gasoline and oil distribution and the occupation of the insured is so stated in the main policy, ex. 7. A tank-truck cannot be operated for the purpose for which it is intended unless it is driven upon a service-station lot, the hose is connected to a faucet at the rear of the truck and gasoline is permitted to run from the tank on the truck into the underground tank on the service-station lot. Certainly, therefore, what occurred was when the truck was being used for the purpose for which it was designed, and for the purpose of what was the whole business of the plaintiff company. In fact, the mere driving of a tank-truck along the highway, without loading or unloading, could not be "use" of the truck for the purpose for which it was designed.

The point seems to have been subject to little judicial determination in Canada. Reference was made to *Honan and Honan v. McLean and McLean*, 7 W.W.R. (N.S.) 337, affirmed 8 W.W.R. (N.S.) 523, [1953] 3 D.L.R. 193, a decision of Davis J., in which he held that a plaintiff was entitled to recover under the provisions of The Vehicles Act of Saskatchewan which created liability for accidents "caused by" an automotive vehicle. One defendant had owned a truck equipped with a winch and cable and the other defendant, after the last employment of the winch, instead of rolling the cable back on the winch, had merely coiled it and



thrown it loosely into the back of the truck, with the result that when the truck was driven along the highway the cable bumped or slid off the back of the truck and whipped around two pedestrians, causing them to be dragged behind the truck and terribly injured. I can obtain little assistance from this decision because the circumstances are so different and because the interpretation is of the words "caused by" rather than "used".

The Court of Appeal for Ontario twice dealt with the circumstances which arose in the action of *Dokuchia v. Domansch*, [1945] O.R. 141, [1945] 1 D.L.R. 757. There Dokuchia, who was not an employee of Domansch, although he had been offered employment, was riding with Domansch in the latter's truck, when it developed motor trouble. Domansch first experimented and found that if he filled the carburetor with gasoline the truck would proceed until that gasoline was exhausted, and then he requested Dokuchia to take up the hazardous task of sitting on the fender of the truck and pouring gasoline into the open carburetor, with the well-nigh inevitable result that an explosion took place and Dokuchia was thrown from the truck and very seriously injured. At trial in the action of *Dokuchia v. Domansch* the Court awarded judgment to Dokuchia and the defendant appealed to the Court of Appeal. Laidlaw J.A., at p. 145, quoted the provision of The Highway Traffic Act imposing upon the owner liability for damages arising "by reason of negligence in the operation of such motor vehicle on a highway" and also by reason of the motor vehicle being on the highway, and continued:

"The plaintiff's injuries were not caused by negligence in the operation of a motor vehicle on a highway or by reason of a motor vehicle on a highway. The motor vehicle was no doubt the instrument and object in collision with the plaintiff but the real cause—the *causa causans*—was the explosion of gasoline being used by him in compliance with the defendant's request or directions."

The learned justice of appeal therefore found the defendant liable for negligence under the common law. Henderson J.A. concurred with Laidlaw J.A. and also was of the opinion that if The Highway Traffic Act applied, the plaintiff could recover notwithstanding the provisions of what is now s. 50(2) of The Highway Traffic Act, R.S.O. 1950, c. 167. McRuer J.A. (as he then was) also concurred similarly.

Failing to realize upon his judgment against Domansch, the plaintiff sued Domansch's insurer and the judgment of the Court of Appeal upon that action is reported *sub nom. Dokuchia v. St. Paul Fire & Marine Insurance Company*, in [1949] O.R. 170, 16 I.L.R. 67, [1949] 2 D.L.R. 171. Roach J.A. quoted the provisions of the policy in the following form: "The insurer agrees to indemnify the Insured . . . against the liability imposed by law upon the Insured . . . for loss or damage arising from the ownership, use or operation of the automobile . . .", and at p. 179, having referred in detail to the judgment of the Court of Appeal in *Dokuchia v. Domansch, supra*, he concluded:

"The aggregate result of those reasons is that the decision of this Court on that appeal was that the injuries of the plaintiff did not arise from the use or operation of the truck.

"That decision is binding on the parties to that action. I wish it were not also binding on me because, with the utmost respect, I think it was wrong, and that the plaintiff's injuries did arise from the use or operation of the truck as found by Urquhart J."

With the utmost respect, I am of the opinion that the reasons of Laidlaw J.A., as quoted above, result only in the holding that the injuries of the plaintiff did not arise in the "operation" of the motor vehicle on the highway and that Laidlaw J.A. was not required to consider whether those injuries arose in the "use" of a motor vehicle. The word "use" does not appear in The Highway Traffic Act but did appear in both the contract of insurance being considered in that case and the ones involved in this case. However, I do not believe that I am bound to hold that the loss in this action did not occur during the "use" of the vehicle because the Court of Appeal held in the *Dokuchia* case that the injuries did not occur in the "use" of a truck when it was being driven with the plaintiff in that action sitting on the fender pouring gasoline into a carburetor. As I have said, there seems to be no more natural understanding of the word "use", as applied to a tank-truck, than the delivery of gasoline from the tank on the truck to the underground tank in the service-station.

This view has been taken in several decisions in the United States Courts.

In *General Accident Fire & Life Assur. Corporation Limited v. Hanley Oil Co., Inc. et al.* (1947), 72 N.E. 2d 1, the Supreme

Court of Massachusetts considered an action by the Hanley Oil Company against its insurer for indemnification against damage caused when a fuel-oil truck of that company had been used to deliver a quantity of oil to a home for domestic heating purposes. There, as here, the oil was running from a tank-truck into an underground tank but when the underground tank overflowed, due to the driver's carelessness, the oil flowed into the cellar of the home and the driver left the scene unaware of the hazard which he had created. The fire occurred when the truck had been driven away and was not even near the locale, but the Court held that the policy covering damage due to the "ownership, operation, maintenance, control or use" of the automobile covered the loss.

In *Panhandle Steel Products Co. v. Fidelity Union Casualty Co.* (1929), 23 S.W. 2d 799, the Court of Civil Appeals in the State of Texas held that a policy indemnifying against third persons' claims by or arising from "the ownership, maintenance or use of an automobile" covered a case where an iron bar was being unloaded and a person was injured, holding that such an action was a "step incidental to the use of the truck".

In *Schmidt v. Utilities Ins. Co. et al.* (1944), 182 S.W. 2d 181, the Supreme Court of Missouri held that a plaintiff who fell over blocks that had been placed by coal company employees so that a loaded coal truck might be backed over the sidewalk and left there, had a claim which was covered by a policy against loss arising out of "use" of the truck, holding that these words were much broader in import than the words "caused by".

I must therefore conclude that the defence of the defendant R. C. Stevenson (Lloyd's) has not been established and that the plaintiff is entitled to judgment against that defendant.

In addition to the defence already dealt with, Canadian General Insurance Company also defends on the ground that a paragraph in the property damage endorsement (part of ex. 6) reads as follows:

"This Endorsement shall have no application with respect to and shall not extend to nor cover any claim for injury to or destruction of (a) property owned or occupied by or leased to the Insured or, except with respect to the liability assumed under written agreement with a railway company for a sidetrack or crossing, or written agreement for elevator or escalator mainte-



nance, property used by or in the care, custody or control of the Insured, (b) work abandoned by or completed by or for the Insured or (c) goods or products manufactured, sold, handled or distributed by the Insured."

The service-station lands and building were owned by one John Gardiner and leased by Gardiner to the plaintiff company under lease dated 12th May 1950 to run for five years from the 1st November 1950. This lease was produced at trial and identified as ex. 9. The plaintiff company then sublet the same land and premises to Ronald Riddell under a lease dated 5th September 1950 running for a period of one year from the same date, *i.e.*, 1st November 1950. On the 24th August 1951, that is, seven days before the date on which the fire occurred, the plaintiff company entered into a second lease with the same Ronald Riddell for a term of one year to commence on the 1st November 1951, that is, the parties had already agreed to let the same accommodation for the period which followed the fire and during the period when the service-station ceased to operate due to destruction by the fire. The defendant Canadian General Insurance Company states that so far as the claim by Gardiner is concerned, it is a claim for injury to or destruction of property leased to the insured and therefore within the above exclusion.

In referring to the doctrine of proximate cause Welford on Accident Insurance, 2nd ed. 1932, pp. 175-6, states: "Its application, therefore, depends upon the broad principle that the policy was intended to cover any loss which can fairly be attributed to the operation of the peril, rather than upon drawing nice distinctions between the varieties of phrases used in particular policies to express the causation of the loss."

Although the subject matter of the learned author is not the wording of an exclusion I think that it is appropriate in the interpretation of insurance policies, and particularly exclusions, to consider the broad principle that the policy was intended to cover any loss which could be fairly attributed to the operation of peril.

The exclusion quoted above relied upon by the defendant shows that it deals with the following cases: (i) property owned by the insured; (ii) property occupied by the insured; (iii) property leased to the insured; (iv) property used by or in the care or control of the insured; (v) goods abandoned by or completed by

or for the insured; (vi) goods or products manufactured, handled or distributed by the insured.

It will be seen that in each of the above, with the exception of property leased to the insured, it is an essential characteristic of the property that it is within the control and custody and care of the insured. It will also be realized that property leased to the insured would normally be in the control and possession of the insured. I have come to the conclusion that the parties intended to exclude a loss of property so under the control or possession of the insured, and did not contemplate at all a case where the insured, although it was the lessee of certain property, had in turn relet it so that it was under the control of someone else and then that property was damaged so that a claim was made against the insured. In this action, so far as Mr. Gardiner was concerned, his claim was in no way based on his character as lessor to the plaintiff company but was based on the negligence of Harold Anstey, the driver of the truck, who was also a party defendant to Gardiner's action. The fact that the plaintiff was the lessee from John Gardiner was not even mentioned in either the statement of claim or the statement of defence. Therefore I have determined to interpret the exclusion referred to as comprising only property which was leased to and in the control of the insured at the time of the loss and therefore this defence fails.

The next defence relied upon by Canadian General Insurance Company is one which is based upon exclusion no. 3 in the policy, ex. 6. That exclusion reads:

"This Policy shall have no application with respect to and shall not extend to nor cover any claim arising or existing by reason of any of the following matters: . . .

"(3) Any motor vehicle (including trailer or semi-trailer) that is required by law to have a license or permit, and which is off premises owned, rented or controlled by the Named Insured, or which is owned, hired or leased by the Insured, and, except with respect to operation by independent contractors, the ownership, maintenance or use, including loading or unloading, of any (a) watercraft while away from such premises or (b) aircraft."

In my view, this exclusion is most ineptly worded. It appears to exclude claims arising or existing by reason of any "motor vehicle"—not the presence of any motor vehicle, not the opera-

tion of any motor vehicle, the ownership or any motor vehicle or the use of it, but merely the existence of it. When the same exclusion later deals with aircraft or watercraft, it stipulates "ownership, maintenance or use, including loading or unloading".

Hodgins J.A., in *O'Reilly v. Canada Accident and Fire Insurance Co. Ltd.*, *supra*, at p. 416 said: "This would be consonant with the sound rule of construction that those who stipulate for an exception should be limited to the narrowest significance of the words used. . . ."

Preston and Colinvax in *Laws of Insurance*, 1950, at p. 31, remark: "Quite apart from contradictory clauses in policies ambiguities are common in them and it is often very uncertain what the parties to them mean. In such cases the rule is that the policy, being drafted in language chosen by the insurers, must be taken most strongly against them."

If one were to consider the words of this exclusion in their broadest sense, it would exclude any claim for damages paid to the owner of an automobile standing at the curb in front of the plaintiff's place of business if through the insured's negligence an explosion occurred, the wall blew out and the automobile was smothered by the fallen wall. Merely to cite such an example shows that the exclusion could not possibly be considered in the broadest meaning of the words. It would seem more intelligible to use the means of interpretation suggested by counsel for the plaintiff and to say that the words "ownership, maintenance or use" having been omitted from the portion dealing with automotive vehicles and appearing in the portion of the exclusion dealing with watercraft and aircraft, the exclusion as far as automobiles are concerned should be limited to the loss arising from their "operation". I have already stated that in my opinion the loss here did not arise in the "operation" of a truck but it did arise in its "use". The purpose of the general liability policy is to cover possible losses due to accident in the general conduct of the business of the insured, and when the insured is a distributor of petroleum products, a loss due to the exploding or igniting of such petroleum products is a natural loss which certainly would be within the contemplation of both the insured and the insurer. As Welford, *op. cit.*, points out, the broad principle is to find if the policy was intended to cover any loss which can be fairly attributed to the peril of the operation and by



the interpretation which I have suggested that principle is carried out.

I am therefore of the opinion that this interpretation is the sound one and that I should hold that what was intended to be excluded was a peril arising not through the general conduct of the business of the distributor of gasoline and oil but through the operation of a motor vehicle in transporting that gasoline and oil, and that the clause should be so interpreted. If my view upon this is correct, then this defence of the defendant Canadian General Insurance Company also fails.

It would appear, therefore, that the plaintiff is entitled to judgment as against both defendants. It will be realized, of course, that the plaintiff cannot recover the full amount of the loss sustained from each defendant, and counsel agreed that if both defendants should be found liable upon the policies, then the usual pro-rating would take place under the provisions of the policies. The question of the pro-rating was not the subject-matter of detailed consideration during the trial and the parties should be able to work this out without the assistance of the Court. If necessary, the matter may be spoken to.

The plaintiff's claims were as follows:

Paid on judgments:

|                 |                                |
|-----------------|--------------------------------|
| Finnemore ..... | \$1,265.00 and costs, \$395.70 |
| Morrison .....  | \$1,200.00 and costs, \$373.00 |
| Dalton .....    | \$700.00 and costs, \$169.00   |
| Thompson .....  | \$167.45 and costs, \$28.25    |
| Mordush .....   | \$625.00 and costs, \$125.00   |
| Gardiner .....  | \$6,775.00 and costs, \$337.50 |
| Riddell .....   | \$3,000.00 and costs, \$337.50 |

In addition, the plaintiff's own solicitors delivered to the plaintiff bills for their costs in carrying out the negotiations with and the actions by the various claimants. Those bills are as follows:

|                 |          |
|-----------------|----------|
| Finnemore ..... | \$414.70 |
| Morrison .....  | \$378.00 |
| Dalton .....    | \$127.00 |
| Thompson .....  | \$ 15.00 |

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\$934.70

These bills have not of course been taxed but counsel for both defendants conceded that they were reasonable and therefore they may be taken at the amounts of the bills as delivered.

Both policies have as additional agreements the covenant of the insurer to investigate and defend, and therefore the defendants' failure to carry out these covenants resulted in the plaintiff's expending of \$934.70 and it is a proper element of damage. There will therefore be judgment for the plaintiff in each action for \$16,433.10 and costs.

The plaintiff will of course only recover one counsel fee at trial which should be apportioned 40 per cent. against the defendant Lloyd's and 60 per cent. against the defendant Canadian General Insurance Company.

*Judgment for plaintiff.*

*Solicitors for the plaintiff: Ivey, Livermore & Dowler, London.*

*Solicitor for the defendant Stevenson: Haines, Thompson & Rogers, Toronto.*

*Solicitors for the defendant Canadian General Insurance Company: Day, Wilson, Kelly, Martin & Morden, Toronto.*

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[COURT OF APPEAL.]

**Boykowych v. Boykowych and Gadzalia.**

*Divorce — Evidence — Sufficiency of Proof of Adultery — Degree of Proof Required — Proper Direction to Jury.*

It is now settled that in an action for divorce on the ground of adultery the standard of proof required is that required in any other civil action: *George v. George and Logie*, [1950] O.R. 787; *Smith v. Smith and Smedman*, [1952] 2 S.C.R. 312. But the cogency of the evidence required to prove a given fact may vary with the nature of the fact, as illustrated by such cases as *The London Life Insurance Company v. Trustee of the Property of The Lang Shirt Company Limited*, [1929] S.C.R. 117; *Adams v. Glen Falls Insurance Co.* (1916), 37 O.L.R. 1; *Morris v. Davies* (1837), 5 Cl. & F. 163; and *Welstead v. Brown*, [1952] 1 S.C.R. 1. The evidence must be such as leads the tribunal of fact, acting with care and caution, to the fair and reasonable conclusion that the act of adultery was committed, and the "reasonable satisfaction" of the jury cannot be produced by "inexact proofs, indefinite testimony, or indirect inferences". *Briginshaw v. Briginshaw et al.* (1938), 60 C.L.R. 336, quoted. The jury should be instructed to this effect because of the nature of the fact in issue rather than because of the gravity of the consequences flowing from a finding that the fact has been proved.

*Evidence — Admissibility — Circumstantial Evidence — Action for Criminal Conversation — Admission by One Alleged Adulterer — Admissibility against Other.*

In an action for criminal conversation evidence of an admission by the plaintiff's wife that she has committed adultery is admissible against the alleged adulterer even if it was not made in his presence. The evidence is admissible, not as evidence of the fact admitted, but because the mere making of the admission constitutes an item of circumstantial evidence that the jury is entitled to consider in conjunction with the other circumstances of the case. *Welstead v. Brown*, *supra*, at p. 19, applied.

AN APPEAL by each defendant from the judgment of Anger J., entered on the findings of a jury.

13th March 1953. The appeal was heard by ROACH, AYLESWORTH and GIBSON JJ.A.

*R. F. Wilson, Q.C.*, for the defendant wife, appellant: I have two grounds of appeal: (1) the jury's verdict was perverse, and (2) the learned trial judge did not properly instruct the jury.

There was no direct evidence of adultery. The fact is that Mrs. Boykowych has lived in Gadzalia's house, pursuant to her lease, and that he often drives her to do her shopping, but there is no evidence of her having any part in the management of the house, or doing the housework. [ROACH J.A.: The jury has found as a fact that adultery was committed. Are you here to say that that finding was wrong?] Yes.

The learned trial judge charged the jury on adultery only, and in doing so he indicated that adultery might be established by a preponderance of evidence, as in an ordinary civil action. He



did not state the rule as laid down in *Bruce v. Bruce and Bratty*, [1947] O.R. 688. When the doctor's evidence is considered with that of the defendants, adultery appears unlikely.

*Bruce v. Bruce and Bratty*, *supra*, was a case of indirect evidence, whereas in *George v. George and Logie*, [1950] O.R. 787, [1951] 1 D.L.R. 278, there was direct evidence of adultery. I refer also to the judgment of Hope J.A. in the *Bruce* case at p. 692; *Smith v. Smith and Smedman*, [1952] 2 S.C.R. 312 at 319, [1952] 3 D.L.R. 449; *Briginshaw v. Briginshaw et al.* (1938), 60 C.L.R. 336.

My submission is that the learned trial judge failed to put all the possible alternatives before the jury. As Cartwright J. pointed out in *Smith v. Smith and Smedman*, *supra*, this finding has most serious consequences for the defendant wife, and it is therefore essential that the jury should be properly and adequately directed.

*J. J. Robinette, Q.C.*, for the defendant Gadzalia, appellant: I adopt the argument of Mr. Wilson.

*G. T. Walsh, Q.C.* (*W. C. Cuttell*, with him), for the plaintiff, respondent: The learned trial judge's charge was proper, the law was adequately explained to the jury, and there was evidence to support the finding of adultery. [ROACH J.A.: The trial judge said: "It is for you to say, gentlemen, after considering and weighing all the evidence, whether the plaintiff's wife and Gadzalia are living innocently together in that house or whether, applying your judgment and common sense, you feel they cannot be doing so. In evidence of their innocence you have only the direct denial of the plaintiff's wife and of Gadzalia." Should he not have told the jury that they should assume that the relations were innocent until they found proof to the contrary? There was other evidence indicating innocence. The plaintiff's daughter arranged for her mother to go to Gadzalia's to live, but the trial judge did not mention that fact.] [AYLESWORTH J.A.: There was no objection at trial on that ground.]

Even if there has been misdirection this Court should not order a new trial, under s. 28 of The Judicature Act, R.S.O. 1950, c. 190, unless there has been a substantial wrong or miscarriage of justice. I refer to *Imerson v. Nipissing Central Railway Co.*, 57 O.L.R. 588, [1925] 4 D.L.R. 504; *McAuliffe v. Hubbell*, 66 O.L.R. 349, [1931] 1 D.L.R. 835, and the other cases

cited in Holmested & Langton's Ontario Judicature Act, 5th ed. 1940, at p. 208.

It is true that the learned trial judge did not use the language of Roach J.A. in *Bruce v. Bruce and Bratty*, *supra*, but he did make it clear that there must be a real preponderance of evidence.

*R. F. Wilson, Q.C.*, in reply, referred to Holmested & Langton, *op. cit.*, at p. 209.

*Cur. adv. vult.*

18th September 1953. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by each of the defendants from the judgment pronounced by Anger J. on 3rd May 1952.

The claim of the plaintiff was for

- (a) dissolution of his marriage on the ground of adultery committed by the defendant wife with her co-defendant;
- (b) damages for alienation of affections;
- (c) damages for criminal conversation.

The action was tried by a jury, which found, in answer to questions submitted to them by the trial judge, that the defendant wife had committed adultery with her co-defendant, and assessed the plaintiff's damages as a result of adultery at \$2,500.

From the judgment pronounced on those findings both defendants have appealed.

The grounds of appeal in both notices of appeal were several, but not all of them were argued in this Court. Those that were argued are as follows:

- (1) that the learned trial judge erred in his charge to the jury as to the degree of proof necessary to prove adultery;
- (2) that there was insufficient evidence to prove adultery, and the jury's finding of adultery was perverse;
- (3) that evidence of admissions of adultery made by the wife, not in the presence of the defendant Gadzalia, were not admissible as against him, and the trial judge erred in not so directing the jury.

Before dealing with those reasons it is necessary first to make some reference to the evidence, and also to quote from the trial judge's charge.

The plaintiff and the defendant spouse were married at the city of Toronto on 15th February 1925. At the time of the trial they were 55 and 46 years of age respectively. They have one child only, a daughter, now married, namely, Ann Radyk.

The defendant Gadzalia came to Canada in 1928. He is married but his wife resides in Poland. At the time of the trial he was 56 years of age.

In November 1945 the plaintiff and his wife were living at 1066 Dundas Street in Toronto. Living with them were their married daughter and her husband. In that month Gadzalia came to live with them. At first he was only a roomer, but later he became also a boarder.

In July 1947, as the result of a notice to quit given to him by the plaintiff, Gadzalia moved to 109 Givens Street.

In February 1948 he purchased the property at 106 Rogers Road and moved to that address. The deed was taken in his name alone. By deed dated 5th April 1948 he conveyed that property to himself and his co-defendant as joint tenants. On 21st June 1949 the defendant wife left the plaintiff and went to live at 106 Rogers Road, and since then the defendants have both lived at that address. By deed dated 1st September 1949, they reconveyed that property to Gadzalia for a consideration expressed therein as \$1 and natural love and affection. By a mortgage bearing the same date Gadzalia conveyed and mortgaged the property to the defendant wife to secure \$1,500 without interest, the principal to become due on 1st September 1959. There is an acceleration clause in the mortgage which provides that it shall become due in the event of the property being sold or on the mortgagor's death. By lease, also bearing the same date, Gadzalia leased the property to the defendant wife for the life of the lessor and for the consideration of \$1 per year, "the use of the same to be shared with the lessor".

The plaintiff testified that one day in May 1947 he saw Gadzalia embracing and kissing his wife in the kitchen at the Dundas Street address. Shortly thereafter he gave Gadzalia the notice to quit which resulted in Gadzalia moving to the Givens Street address. His wife was thereby annoyed and when Gadzalia left she discontinued sleeping with the plaintiff, and thereafter slept in the room on the third floor which Gadzalia had occupied. On being questioned by the plaintiff, the wife



said: "Don't bother me any more. You are not my husband. My husband is Albert Gadzalia." Thereafter the plaintiff did not have any sexual relations with his wife because she objected and told him that she had a "better husband".

The plaintiff further testified that after Gadzalia moved to the Givens Street address, the habits of the wife also changed in other ways. She would leave her home in the evenings and not return until a very late hour, and on occasions remained away all night. When questioned by the plaintiff, she would reply that it was none of his business and that she had a husband, Albert Gadzalia.

The plaintiff's niece, Doris Hutchinson, testified that in February or March 1948, after Gadzalia had moved to Rogers Road, she had seen him and the plaintiff's wife, her aunt, on one occasion walking arm-in-arm on the street. After she passed them they separated, one walking ahead of the other. On another occasion she saw them together again and, in an obvious effort to avoid detection, they crossed to the other side of the street.

The plaintiff testified that he had seen his wife and Gadzalia many times in the evenings driving together in a truck. The evidence is not very clear as to when that was, but my understanding is that it was after his wife had moved to Rogers Road.

After the plaintiff's wife moved to the Rogers Road address, according to the plaintiff, she telephoned him and said in substance not to bother her, that she had a house, a place, a husband and everything she needed.

The evidence of the defendants was a complete denial of any improper conduct with each other. According to them, the wife is acting only as a housekeeper for Gadzalia; she occupies two rooms in the Rogers Road house and they do not even eat together; even before the wife moved to that address, she had been employed by Gadzalia as his housekeeper, going there daily. They explained the conveyances of the Rogers Road property by saying that the deed in joint tenancy was a mistake, that she had lent Gadzalia money and was anxious only to have the loan secured and that the original error was corrected by the reconveyance and subsequent mortgage.

According to the wife the plaintiff was always quarrelsome and jealous and their life together was one of constant quarrel-

ling. In this she was corroborated by her married daughter. On the other hand, the daughter's husband stated in evidence that the plaintiff and his wife got along happily together until Gadzalia came to live with them and soon thereafter they began quarrelling. The subject of their quarrels was always Gadzalia; the plaintiff did not want him in the house but the wife insisted he should remain.

The wife denied any admissions to her husband of misconduct with Gadzalia and explained her objections to sexual relations with him by stating that due to a growth in her sexual organs and surgical operations for its removal in 1940 and 1942 the act was painful. That she had a growth and surgical operations was confirmed in evidence by the surgeon who also stated that she had complained to him that the sexual act was painful both before and after the operations.

I think the foregoing is a fair summary of the evidence.

The learned judge in his charge to the jury said:

"Now the onus or burden of proof is upon the plaintiff. He must establish that adultery took place by a preponderance of credible evidence. The reason is that the charge of adultery is easy to make but difficult to meet. Though the plaintiff must prove adultery, and caution is always necessary before finding that it was committed, nevertheless there is rarely an eye-witness to adultery, and, if the evidence submitted on behalf of the plaintiff is such that you reach the conclusion that applying your common sense you must infer that adultery was committed, you are entitled to find that it was committed. . . . I shall confine my remarks on the evidence to such matters as may be helpful to you by my mentioning what you are entitled to do."

The learned trial judge then reviewed the evidence and continued:

"Now the act of kissing or the act of walking arm-in-arm are scarcely evidence of adultery, gentlemen. That is obvious, for people may be fond of each other without committing adultery. But if you believe the husband when he says his wife told him she had slept with Gadzalia and if you believe that there are other circumstances which cause you to infer that adultery was committed, then the act of kissing and the act of walking arm-in-arm would be in keeping with your conclusion. . . .

"It is true, of course, that two people could thus live together without committing adultery, but it is equally obvious that adultery could have been committed. I mentioned earlier that adultery must be proved by a preponderance of credible evidence because it is easy to charge adultery and difficult to disprove it. On the other hand, when the plaintiff's wife and the corespondent are shown to be living alone in the same house, it is easy for either or both of them to say that they have not committed adultery and difficult to prove that they have, for there can be no eye-witness always watching. . . .

"You may feel, after listening to the plaintiff's wife and Gadzalia, that they are telling the truth and that they did not commit adultery, that their living together has just been great imprudence, that their living together is explained by his desire to give her shelter or by a purely business arrangement whereby she would occupy part of the house on terms and render services. On the other hand, you may feel, applying your common sense to what definitely cannot be known to you, that these two people have been living together as man and wife. Faced by the admitted fact of cohabitation by these two people and the fact that the only evidence which carries you through the hours of the night is the evidence of these two people whose interest it is to deny wrongdoing, you may feel that, applying your judgment based upon your knowledge of the ways of human society, you must infer that they have committed adultery and that to find otherwise is to stretch your credulity too far. . . .

"In evidence of their innocence, you only have the direct denial of the plaintiff's wife and of Gadzalia. In contradiction you have whatever conclusions you think you should draw from the facts of life and the nature of the documents to which I have referred. Nevertheless, gentlemen, I want you to know that you are entitled to believe that these two people are living together in innocence if that is your belief after listening to the evidence."

Counsel for both defendants raised a number of objections to the charge, but they did not include the objections taken in this Court.

Counsel for the defendant wife pointed out to the trial judge that the jury might misunderstand what the judge had meant when he used the phraseology "in view of the admitted evidence



as to cohabitation". The learned judge recalled the jury and in the course of his further instructions he said this:

"My use of the words 'admitted cohabitation' simply means that it has been admitted that Mrs. Boykowych and Mr. Gadzalia are living at 106 Rogers Road. That is what is admitted. The rest of my remark was that when you are faced with that admitted fact and the only evidence carrying you through the night as to what happened would be the evidence of those two alone, you may feel that you must infer adultery."

I turn now to the grounds of appeal that were argued in this Court.

First, as to the degree of proof necessary to prove adultery:

It is now definitely established that in an action for divorce on the ground of adultery the standard of proof is that required in a civil action: *George v. George and Logie*, [1950] O.R. 787, [1951] 1 D.L.R. 278, and *Smith v. Smith and Smedman*, [1952] 2 S.C.R. 312, [1952] 3 D.L.R. 449. To that extent the learned trial judge was right when he instructed the jury that the burden of proof was upon the plaintiff to "establish that adultery took place by a preponderance of credible evidence".

In *Smith v. Smith and Smedman*, *supra*, Cartwright J. quotes with approval a passage from the judgment of Dixon J. in *Briginshaw v. Briginshaw et al.* (1938), 60 C.L.R. 336, in the High Court of Australia, in part as follows:

"Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

From the judgment of this Court in *George v. George and Logie*, *supra*, Cartwright J. also quotes with approval this passage:

"The judicial mind must be 'satisfied' that the alleged act of adultery was in fact committed, but it need not be satisfied to the extent of a moral certainty as in a criminal case. Evidence that creates only suspicion, surmise or conjecture is, of course, insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal—be it judge or jury—acting with care and caution, to the fair and reasonable conclusion that the act was committed."

Having quoted these extracts, Cartwright J. says: "In my opinion the tribunal of fact deciding an issue of adultery in a proceeding for divorce should be instructed in the sense of the above quoted passages, not because the standard of proof required differs from that in other civil actions but because the consideration entering into the formation of judgment which Dixon J. describes by the words 'the gravity of the consequences flowing from a particular finding' assumes great importance in such a case."

Rand J. in *Smith v. Smith and Smedman*, *supra*, says this: "There is not, in civil cases, as in criminal prosecutions, a precise formula of such a standard: proof 'beyond a reasonable doubt', itself, in fact, an admonition and a warning of the serious nature of the proceeding which society is undertaking, has no prescribed civil counterpart; and we are not called upon to attempt any such formulation. But I should say that the analysis of persuasion made by Dixon J. in the High Court of Australia, in part quoted by my brother Cartwright, is of value to judges as illuminating what is implicit in the workings of the mind in reaching findings of fact. No formula of direction is here involved; instructions to juries are left exactly where they were; but it is at all times desirable to have these elusive processes progressively made more explicit."

With respect I prefer to state the proposition thus, that the nature of the fact in issue, rather than the gravity of the consequences flowing from a finding that the fact has been proved, is the determining factor which requires the tribunal to be charged as Cartwright J. says, and as I agree, it should be charged. The proposition thus stated avoids what I respectfully suggest would appear to be a conflict with the proposition as stated by Cartwright J. and the fundamental principle that the tribunal in

reaching its decision should be guided by the evidence alone and not by the results of its finding.

That the cogency of the evidence required to prove a given fact may vary as the nature of the fact varies is illustrated in such cases as *The London Life Insurance Company v. Trustee of the Property of The Lang Shirt Company Limited*, [1929] S.C.R. 117, [1929] 1 D.L.R. 328, 51 C.C.C. 31; *Adams v. Glen Falls Insurance Co.* (1916), 37 O.L.R. 1, 31 D.L.R. 166; *Morris v. Davies* (1837), 5 Cl. & F. 163, 7 E.R. 365, and other cases in which the issue was legitimacy, cited by Kerwin J. in *Welstead v. Brown*, [1952] 1 S.C.R. 1 at pp. 11 *et seq.*, [1952] 1 D.L.R. 465, 102 C.C.C. 46.

Then, in the instant case did the trial judge charge the jury in accordance with the rule? He told them that "the burden of proof [was] upon the plaintiff"; that "he must establish that adultery took place by a preponderance of credible evidence"; and that "caution is always necessary before finding that it was committed". In my opinion that was a bare compliance with the rule, and looking at the charge as a whole I think the jury would understand that adultery could not be proved by "inexact proofs, indefinite testimony or indirect inferences" and that it could be proved only by evidence which would lead them, "acting with care and caution, to the fair and reasonable conclusion that the act was committed".

In any event, after a consideration of all the evidence, I am of the opinion that no miscarriage of justice resulted from the trial judge's rather bare compliance with the rule.

In my opinion the second ground of appeal fails. There was evidence on which the jury, applying common sense as they were invited to do, could find that adultery had been committed.

Then, as to the third ground of appeal:

This ground of appeal was put forward by the appellant Gadzalia.

The evidence of statements made to the plaintiff by his wife was legally admissible against Gadzalia, not as evidence of the truth of the contents of those statements but because the making of those statements constituted an item of circumstantial evidence which the jury would be entitled to consider in conjunction with all the other circumstances. I refer to the reasons of Cartwright J. in *Welstead v. Brown*, *supra*, at p. 19.



The learned trial judge correctly instructed the jury as to the limited evidentiary value of those statements. He said: "... if you believe the husband when he says his wife told him she had slept with Gadziala and if you believe that there are other circumstances that cause you to infer that adultery was committed", etc., etc.

For the foregoing reasons these appeals fail and should be dismissed with costs.

*Appeals dismissed with costs.*

*Solicitors for the plaintiff, respondent: Jackson & Cuttell, Toronto.*

*Solicitor for the defendant wife, appellant: Day, Wilson, Kelly, Martin & Morden, Toronto.*

*Solicitor for the defendant Gadziala, appellant: H. G. Chappell, Toronto.*

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[COURT OF APPEAL.]

**Lemieux and Lemieux v. Bedard.**

*Motor Vehicles — Liability to Passengers — Whether Vehicle Used "in the business" of Carrying Passengers for Compensation — Isolated Occasion — The Highway Traffic Act, R.S.O. 1950, c. 167, s. 50(2).*

A motor car can, in certain circumstances, be operated in the business of carrying passengers for compensation even if it is so operated for only one day or on only one occasion. The test whether or not the motor car is being operated in the business of carrying passengers for compensation is not whether or not the particular occasion or transaction in question was an isolated one. *Poirier et al. v. Warren* (1942), 16 M.P.R. 213, discussed. One who enters into an agreement to transport other persons in his automobile on a particular journey, in return for payment of an agreed sum of money, and proceeds to carry out the agreement, makes it his business on that occasion to carry passengers for compensation, and will not be relieved by s. 50(2) of The Highway Traffic Act from liability for his negligence, even if there is no evidence that he has engaged in the business on any other occasion.

Judgment of Spence J., [1952] O.R. 500, affirmed on different grounds.

AN APPEAL by the defendant from the judgment of Spence J., [1952] O.R. 500, [1952] 4 D.L.R. 421, dismissing an appeal from the judgment of McDougall Co. Ct. J., to whom the action had been referred for trial.

21st September 1953. The appeal was heard by PICKUP C.J.O. and ROACH and GIBSON JJ.A.

*W. M. Martin, Q.C.*, for the defendant, appellant: There is nothing in the evidence to show that our car had ever been used for compensation before this one occasion. The agreement with the plaintiffs, and the consequent trip, constituted an isolated occasion, and it therefore cannot be said that we were using the car "in the business" of carrying for compensation within the exception in s. 50(2) of The Highway Traffic Act, R.S.O. 1950, c. 167. [ROACH J.A.: There may be a contradiction in Spence J.'s two findings, that the defendant was not in the business of carrying passengers for compensation, but that he was a private carrier; is there any distinction between the two?] I submit there is no distinction, and the findings are mutually contradictory. A private carrier belongs to a more restricted class than a common carrier. [ROACH J.A.: Your argument is that the defendant was neither a common nor a private carrier, and that he was not using the car in the business of carrying passengers for compensation?] Yes, and that consequently s. 50(2) gives us complete immunity in the circumstances.

I rely on: *Shaw et al. v. McNay et al.*, [1939] O.R. 368, [1939] 3 D.L.R. 656; *Chote v. Rowan et al.*, [1943] O.W.N. 6, [1943] 1 D.L.R. 339, 55 C.R.T.C. 243; *Wing v. Banks*, [1947] O.W.N. 897; *Coutts v. Smith*, [1949] O.W.N. 155; *Poirier et al. v. Warren*, 16 M.P.R. 213, [1942] 1 D.L.R. 739. [ROACH J.A. The governing consideration is whether the car is being used "in the business", and the question therefore is whether the exception applies only to a man who is in the business or whether it includes also an isolated case.] My submission is that it depends upon the circumstances, and that for the exception to apply there must be something to indicate an intention to go into the business. Spence J. found that we were not in the business, and consequently s. 50(2) gives us complete immunity, independently of any other consideration. One cannot be classified as a carrier if one carries persons for compensation on a single occasion. Spence J. applied *Harrison v. Toronto Motor Car Limited and Krug*, [1945] O.R. 1, [1945] 1 D.L.R. 286, but that case was based on the law of master and servant, and is wholly distinguishable from the present one.

In this case the only relationship existing between the parties was that arising out of the contract, and Spence J. erred in holding that the defendant, as a result of entering into a contract

on this isolated occasion, became a private carrier. I refer to MacNamara's Laws of Carriers by Land, 3rd ed. 1925, p. 6. [PICKUP C.J.O.: I cannot see that the idea of a "private carrier" has anything to do with this case; either the defendant was using his car in the business of carrying passengers for compensation or he was not.]

There was no evidence to support the finding of negligence against us.

*J. T. Weir*, for the plaintiffs, respondents: [THE COURT: You need not argue the question of negligence; we will not disturb the findings of fact in this respect.] There is a "business of carrying passengers for compensation", and anyone who undertakes to carry passengers for compensation must be engaging in that business. It is the use of the vehicle that must be considered, rather than the defendant personally. This vehicle on this particular day was carrying passengers for compensation, and the exception in s. 50(2) is clearly applicable. Both *Chote v. Rowan et al.*, *supra*, and *Wing v. Banks*, *supra*, are distinguishable on the facts.

Alternatively, even if we are not within the exception, and s. 50(2) is consequently applicable, Spence J. was right in holding that there was an implied contract to carry the plaintiffs safely, and that the defendant is liable for the breach of that implied term. What *Harrison v. Toronto Motor Car Limited and Krug*, *supra*, decided was that s. 50(2) was to be applied restrictively, and that the Court might and would look to see whether there was liability on any other ground than under s. 50(1).

*W. M. Martin, Q.C.*, did not reply.

*Cur. adv. vult.*

23rd September 1953. The judgment of the Court was delivered by

PICKUP C.J.O.:—This is an appeal by the defendant from the judgment of Spence J. pronounced on 16th May 1952, dismissing an appeal to him by the appellant from the judgment of His Honour Judge McDougall on a reference to him for the trial of this action.

The action was brought for damages arising out of a motor vehicle accident, the respondents being passengers in the appel-



lant's car. The learned trial judge gave judgment in favour of the respondent Auguste Lemieux for the sum of \$4,594 and in favour of the respondent Esther Lemieux for the sum of \$5,981.45. An appeal was taken from the judgment or report of His Honour Judge McDougall to Spence J. who heard the appeal sitting in Weekly Court at Ottawa, and that appeal was dismissed. The appellant now appeals to this Court.

One of the grounds of appeal urged on behalf of the appellant in this Court, as well as before the learned trial judge and the learned judge in Weekly Court, was that no negligence had been proved against the appellant. The accident occurred on a curve when the parties were returning from Montreal to Ottawa. The evidence indicates that the appellant, the driver of the car, slowed his speed to some extent in making the curve but the roadway was slippery and he failed to make the curve, his car going into the ditch. There was no other traffic which in any way interfered with the driving of the appellant's car. As indicated on the hearing of the appeal, this Court will not disturb the concurrent findings of negligence made by the learned trial judge and the learned judge in Weekly Court.

The appellant argues, however, that even if there was negligence on his part in the operation of his motor car on the occasion in question, there is no liability on his part, and he relies upon s. 50(2) of The Highway Traffic Act, R.S.O. 1950, c. 167. Section 50 reads as follows:

"(1) The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner shall be liable to the same extent as the owner.

"(2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle."

The learned trial judge was of the opinion that, in the circumstances of this case, the motor car was being operated by

the appellant in the business of carrying passengers for compensation, and that therefore s. 50(2) did not relieve the appellant from liability for negligence. The learned judge in Weekly Court was of a different opinion on this point and held that, on the occasion in question, the motor car was not being operated in the business of carrying passengers for compensation, but he affirmed the judgment in favour of the respondents on the ground that, on the occasion in question, there was a contractual relationship between the appellant and the respondents whereby the appellant had agreed to carry his passengers for compensation, which involved an implied agreement to drive carefully. He found that the appellant was negligent, and that there was a breach of the contractual agreement between the parties. He also held that the effect of s. 50(2) was not to relieve the appellant from liability in respect of such a cause of action.

I do not think that it is necessary in this case to decide whether the respondents' cause of action based on breach of contract is or is not precluded by s. 50(2), because I am of the opinion that, on the occasion in question, the motor vehicle was being operated by the appellant in the business of carrying passengers for compensation as held by the learned trial judge. The facts as to this are not in dispute. The appellant, being the janitor of an apartment-house in Ottawa, entered into an agreement with the respondents whereby he agreed to transport them to Montreal and back for the sum of \$29. He does not appear to have been, on any occasion before that time, in the business of carrying passengers for compensation, but, in my opinion, he made it his business on that occasion by entering into the agreement in question and proceeding, pursuant thereto, to carry the respondents for the compensation agreed upon.

A number of cases were referred to and discussed on the argument, both in this Court and before the learned trial judge and the learned judge in Weekly Court, but I do not think that any of them is applicable to the facts in this case. It was urged before us by counsel for the appellant that the fact of this being an isolated occasion prevented its being held that the motor vehicle was being operated by the appellant *in the business* of carrying passengers for compensation. This was the view taken by the learned judge in Weekly Court, relying upon

certain dicta of Mr. Justice Richards in the case of *Poirier et al. v. Warren*, 16 M.P.R. 213, [1942] 1 D.L.R. 739. I do not think that the learned judge in that case, in his reference to an isolated payment not preventing the application of the section, meant that an isolated transaction or carrying could not, in other circumstances, amount to the motor vehicle being operated in the business of carrying passengers for compensation. A motor car can, in certain circumstances, be operated in the business of carrying passengers for compensation, even if so operated for only one day or on one occasion. I am not prepared to adopt the view that the test of whether the motor car is being operated in the business of carrying passengers for compensation or not is to be whether or not the particular occasion or transaction is an isolated one.

I am therefore, with respect, unable to agree with the view of the learned judge in Weekly Court on this point, and would affirm the judgment on the ground stated by the learned trial judge. I do not express any opinion as to the grounds upon which the judgment of the learned trial judge was affirmed by the learned judge in Weekly Court.

The result is that the appeal must be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitor for the plaintiffs, respondents: Henri Saint-Jacques, Ottawa.*

*Solicitors for the defendant, appellant: Berger and Snipper, Ottawa.*

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[McRUER C.J.H.C.]

**The Chesapeake and Ohio Railway Company v. Ball.**

*Injunctions—Interlocutory Injunctions—Conditions of Grant—Necessity for Showing Good prima facie Case and Probability of Irreparable Damage—Extreme Caution to be Observed before Restraining Proceedings in Foreign Courts.*

While the Court in Ontario has power to restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign Court, the jurisdiction should be exercised only with extreme care and in a proper case. Mere inconvenience or hardship is not sufficient to justify the interference of the Court. The jurisdiction is for the purpose of preventing the abuse of the Court's process by vexatious and frivolous actions or by a multiplicity of actions, and will not be exercised unless it is clear that this will be the effect of the foreign proceedings. An injunction will be refused if there is no evidence of an abuse of the process of the foreign Court, and it is clear that all the matters raised in support of the proposed injunction can be raised by way of defence in the foreign action. The Court will not decide whether the plaintiff in the foreign action has a good cause of action, and the Court will give credit to the foreign Court for doing justice between the parties. *Pennell v. Roy* (1853), 2 DeG. M & G. 126; *Wright v. Simpson* (1802), 6 Ves. 714; *The North London Railway Company v. The Great Northern Railway Company* (1883), 11 Q.B.D. 30, applied.

Parties should not be restrained by interlocutory injunction unless some irreparable injury is likely to accrue to the plaintiff, and the Court should be particularly cautious where there is a serious question as to whether the plaintiff can ever succeed in the action. If a fair *prima facie* case is made out and there will be irreparable damage if the injunction is refused, it should be granted, but in deciding whether an interlocutory injunction should be granted the defendant's interests must receive the same consideration as the plaintiff's. Although an interim injunction may be granted *ex parte*, this will very rarely be done. *McCharles v. Wyllie* (1927), 32 O.W.N. 202 at 203, quoted and applied.

A MOTION to continue an interim injunction.

3rd September 1953. The motion was heard by McRUER C.J.H.C. in Weekly Court at Toronto.

*T. N. Phelan, Q.C.*, and *D. A. Lang*, for the plaintiff, applicant.  
*W. B. Williston*, for the defendant, *contra*.

3rd September 1953. McRUER C.J.H.C. (orally):—This is a motion made on behalf of the plaintiff for an order to continue an *ex parte* injunction granted by my learned brother Danis on the 17th July 1953, restraining the defendant from proceeding with or carrying on an action for damages against the plaintiff and The New York Central Railroad Company in the State of New York, one of the United States of America. The action sought to be restrained was brought by the defendant on the 30th June 1953 to recover damages for injuries sustained by him while he was in the State of New York and he claims that through the negligence of the plaintiff, The Chesapeake and

Ohio Railway Company, and The New York Central Railroad Company, or one or the other, he suffered serious injury which has resulted in his becoming a permanent paraplegic.

Mr. Kirkpatrick, a claims agent for the plaintiff, has made the main affidavit in the matter which sets out the grounds on which the motion is founded and on which in fact the action is founded.

The plaintiff is a company incorporated under the laws of the State of Virginia, one of the United States of America, and carries on business in the Province of Ontario and no doubt in the State of New York. The defendant at all material times has resided in the city of Niagara Falls in the county of Welland and is a Canadian citizen and a British subject, and up to and until the 24th November 1951 he was employed as a brakeman by the plaintiff. On the 24th November 1951, Mr. Kirkpatrick says, while in the course of his employment with the plaintiff the defendant was severely and permanently injured as the result of an accident involving a collision in a railway yard at Suspension Bridge in the State of New York between a train owned and operated by the plaintiff, upon which the defendant was working, and a train owned and operated by The New York Central Railroad Company, a company incorporated under the laws of the State of New York, which carries on business in the Province of Ontario. Mr. Kirkpatrick states that the collision occurred under such circumstances as to give rise to a cause of action against The New York Central Railroad Company.

On the 14th December the defendant, to whom I shall refer as Mr. Ball, since he is the defendant in this action and the plaintiff in the action that has been commenced in the State of New York, signed what is alleged to be an election to claim compensation under Part I of The Workmen's Compensation Act, R.S.O. 1950, c. 430. This document is in what appears to be Form 36 or 38—it is blurred on the copy I have—of the form used by the Workmen's Compensation Board. On the same date he is said to have signed an election in Form 37 which purported to subrogate and transfer to the Workmen's Compensation Board any right or claim he might have against the third party, that is The New York Central Railroad Company, in respect of the accident. As The Chesapeake and Ohio Railway Company comes under schedule 2 of The Workmen's

Compensation Act, this subrogation, if it is one, was incorrect, and on the 4th January Mr. Ball is said to have signed another document in Form 37 subrogating and transferring to The Chesapeake and Ohio Railway Company "any right or claim I may have against the said third party in respect of the said action", the third party being The New York Central Railroad Company.

Mr. Kirkpatrick says in his affidavit that by letter of the 26th January 1953 he was advised by the Workmen's Compensation Board that Mr. Ball had requested permission to withdraw his election to claim benefits under the Workmen's Compensation Act of Ontario as he intended to take action against The New York Central Railroad Company in the State of New York and asked the plaintiff to accede to the same; and by letter of the 24th February 1953 Mr. Kirkpatrick advised the Workmen's Compensation Board that his company would not grant the defendant the permission requested; and by letter of the 12th March 1953 Mr. Kirkpatrick was advised by the Workmen's Compensation Board that the defendant had made further application for permission to withdraw his claim for compensation, and the election, and that the Workmen's Compensation Board would hold a hearing to inquire into the matter. The hearing was held by the Workmen's Compensation Board on the 9th April 1953 in the presence of all parties, and by letter dated the 23rd April 1953 Mr. Kirkpatrick was advised by the Workmen's Compensation Board that the Board had advised the defendant that they could not accede to his request to withdraw his election. On the 14th April 1953 the plaintiff, that is The Chesapeake and Ohio Railway Company, issued a writ in Mr. Ball's name against the New York Central Railroad Company claiming damages for injuries sustained by Mr. Ball as a result of the accident on the 24th November 1951. By a letter of the 21st June 1953 Mr. Kirkpatrick was advised by the Workmen's Compensation Board that the defendant had again applied to the Board for reconsideration of his case and for a declaration that the papers which he filed with the Board, purporting to be elections, were null and void and that he had not in fact elected to claim compensation or medical aid for his injuries. The letter stated that the Workmen's Compensation Board would again consider the application at a hearing to be held the 25th June 1953. On the 19th June a statement of claim was filed and served in the action that the plaintiff had commenced in Mr.



Ball's name in our Courts. The hearing before the Workmen's Compensation Board was held on the 25th June in the presence of Mr. Ball, in person, when he was represented by a member of the bar of the State of New York, and the plaintiff by counsel from Ontario. Evidence in support of and in opposition to the defendant's application was heard by the Workmen's Compensation Board and on the 26th June, before a decision had been given by the Workmen's Compensation Board pursuant to the hearing on the 25th June, Mr. Ball issued a summons and a claim out of the United States District Court for the Western New York Division of the State of New York against the plaintiff and The New York Central Railroad Company for the sum of \$500,000 by way of damages against each company individually.

On the 13th July the Workmen's Compensation Board gave its decision which reads as follows:

"UPON the application of Melvin Ball for an order declaring any election by him to claim compensation under The Workmen's Compensation Act to be null and void, upon reading the reports, letters, papers and other material filed with the Board, upon hearing the evidence adduced, and upon hearing what was alleged by Counsel for the applicant, Melvin Ball, and the Chesapeake and Ohio Railway Company, no one appearing for the New York Central Railroad Company though given notice for the hearing of the application by the Board;

"THE WORKMEN'S COMPENSATION BOARD does not see fit to grant such application."

The grounds of the motion before me are set out in Mr. Kirkpatrick's affidavit in paras. 18 and 19, which read as follows:

"18. I verily believe that if the Defendant, Melvin Ball, is allowed to commence, or commences, or having commenced, is allowed to proceed with any action in his own name, in any jurisdiction whether foreign or otherwise, for damages arising out of the said accident, and in particular, is allowed to proceed with the action instituted by him in the State of New York in the United States of America, referred to in paragraph 15 hereof, or in any other State of the United States of America, or in any other jurisdiction whatsoever, that the Plaintiff would be required (and in fact is now being required) to be a party to two or more law suits involving the same parties and the same facts,

that two or more Judgments may be awarded against the Plaintiff in two or more jurisdictions, that there would be and there is a multiplicity of actions and proceedings, and accordingly the Plaintiff may suffer irreparable and unjustifiable damage.

"19. I believe that the action above referred to in paragraph 15 brought by the Defendant against the Plaintiff and The New York Central Railroad Company in the State of New York, in the United States of America, is frivolous and vexatious, being brought by the Defendant after he has assigned, transferred and subrogated to the Plaintiff any and all of his rights to bring any such action against The New York Central Railroad Company and while he is barred by the provisions of The Workmen's Compensation Act of Ontario from bringing any such action against his employer, the Plaintiff herein, in this or any other jurisdiction, and that the said Defendant ought to be restrained from so doing."

I have pointed out that the interim injunction was an *ex parte* injunction and the matter now comes before me when both sides can be heard.

Mr. Ball has filed an affidavit that while in the discharge of his duties in the State of New York he sustained serious injuries as a result of which he is now a paraplegic. He says that he was informed by his wife, Eileen Ball, and verily believes that while he was confined to the hospital in Niagara Falls, Ontario, shortly following his accident, he signed Workmen's Compensation forms which she brought to the hospital for his signature at the request of the Workmen's Compensation Board and he was informed by his wife Eileen Ball that he was in an oxygen tent and delirious during that time and that he was assisted in signing his name and that he was not competent or able to read or understand the forms. He says he has no recollection of signing the forms and was unaware that he had made an election or made an assignment of his claim and was not mentally competent when the original forms were signed.

In December he was discharged from treatment at the Toronto General Hospital and Lyndhurst Lodge and he then obtained legal advice. Upon learning that he had enforceable claims in the United States against The New York Central Railroad Company he gave notice to the Workmen's Compensation Board by letter that the forms he had signed should

be considered null and void and upon the advice of the Workmen's Compensation Board he continued to accept compensation until the 4th June 1953, at which time he returned to the Workmen's Compensation Board the full amount of the compensation benefits received by him.

It is argued for the plaintiff that because of the election ss. 12 and 14 of The Workmen's Compensation Act apply and that Ball has no right to maintain the action commenced in the United States of America.

Section 12 reads: "No action shall lie for the recovery of compensation whether it is payable by the employer individually or out of the accident fund, but all claims for compensation shall be heard and determined by the Board."

Section 14 reads: "The provisions of this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or the members of his family are or may be entitled against the employer of such workman for or by reason of any accident happening to him or any industrial disease contracted by him on or after the 1st day of January, 1915, while in the employment of such employer, and no action in respect thereof shall lie."

It is also argued that because of Mr. Ball's alleged election, any right of action he may have against The New York Central Railroad Company is vested in the plaintiff under s. 9(3) of The Workmen's Compensation Act. This subsection reads: "If the workman or his dependants elect to claim compensation under this Part, the employer, if he is individually liable to pay it, and the Board, if the compensation is payable out of the accident fund, shall be subrogated to the rights of the workman or his dependants and may maintain an action in his or their names or in the name of the Board against the person against whom the action lies and any sum recovered from him by the Board shall form part of the accident fund."

With respect to employers coming under schedule 2 of the Act that is not strictly applicable because the amount that is recovered in an action such as the action that has been brought by the plaintiff here against The New York Central Railroad Company is not an amount that forms part of the accident fund.

Section 5 should be referred to. It provides: "Employers in the industries for the time being included in Schedule 2 shall be liable individually to pay compensation and medical aid."



Mr. Phelan, it is unnecessary for me to say, in his usual able manner, relies very strongly on a statement in 18 Halsbury, 2nd ed. 1935, p. 89, para. 125:

"With regard to foreign proceedings, the Court will restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign court whenever the circumstances of the case make such an interposition necessary or expedient."

However, when one reads the cases quoted in the footnote one realizes the importance of the remaining part of para. 125 in Halsbury. It is a long paragraph and I shall not refer to it at length. But it is to be pointed out that the exercise of this power is the exercise of a discretion which should be exercised with extreme caution and that mere hardship or inconvenience is not sufficient to justify the interference of the Court. I will also discuss later one or two of the cases that are referred to in the footnote.

Mr. Phelan relied on *The Christiansborg* (1885), 10 P.D. 141, and on *McHenry v. Lewis* (1882), 22 Ch. D. 397. These were cases where there were contemporaneous actions being carried on in the domestic Courts and the foreign Courts. I discussed these cases at some considerable length in *Empire-Universal Films Limited et al. v. Rank et al.*, [1947] O.R. 775, where I dealt with both and extracted from them what I considered to be the principles that were laid down and I do not think I need to repeat again all that I said in that case. But I want to re-emphasize what was said in *McHenry v. Lewis* at p. 406, where Lord Justice Cotton said that this was a jurisdiction that ought to be exercised with the greatest of caution and again the remarks of Lord Justice Bowen, at p. 408, where he said:

"The kind of jurisdiction which the Court exercises over litigation is, as I have said, to *prevent what is vexatious and an abuse of its own process*. There are many classes of cases in which the Court acts on that principle which I will not attempt now to enumerate. We are all familiar with them. This particular application is based on the suggestion that the Court ought to prevent what is called multiplicity of suits, litigation in various quarters of the world on the same subject-matter between the same parties and at the same time. Where there is more than one suit being carried on in the Queen's Courts, it

is obvious that the case is wholly different. The remedy and the procedure are the same, and a double action on the part of the Plaintiff would lead to manifest injustice. When you get to a case of concurrent litigation both in the Queen's Courts in *England* and in the Queen's Courts in *Ireland* and *Scotland*, the law has probably varied a little. At a time when it was difficult to enforce the judgments of an English Court in other parts of the *United Kingdom*, it was not unreasonable that the case of *Lord Dillon v. Alvares* [4 Ves. 357, 31 E.R. 182] should have been decided as it was. At present I think that case can no longer be cited as conclusive law."

I think that it is a fair statement to say that the exercise of the jurisdiction is to prevent the abuse of the Courts by vexatious and frivolous actions and a multiplicity of actions. But in the case before me Mr. Ball is not bringing two actions. He is not abusing the process of this Court. He has brought one action abroad, and the plaintiff comes to this Court seeking to enjoin him from carrying on that action abroad because it says in effect he has no right of action, or, I think I may put it another way, because it says (a) he has invoked the provisions of The Workmen's Compensation Act and therefore having invoked the provisions of The Workmen's Compensation Act the plaintiff has a good statutory defence to any action that he might have abroad, and (b) any rights that Mr. Ball has to bring the action abroad are vested in the plaintiff now and he has no right to bring the action. Mr. Williston argues that this is not so because there never was a valid election and *the Courts have power to determine* whether there was or not. He also contends that the provisions of The Workmen's Compensation Act on which Mr. Phelan relies have no extra-territorial effect and cannot operate to take away Ball's rights where the cause of action arose abroad. Now I am not overlooking the fact that Mr. Phelan argues that Mr. Ball, having accepted compensation, is now estopped from claiming that his election was null and void or he is barred by acquiescence from denying that his election is valid. For reasons I shall state in a moment I do not think that is a matter that can be inquired into on an interlocutory motion. Unless I can come to the conclusion that Mr. Ball's action abroad is frivolous and vexatious I cannot see why I should restrain him from having

it tried in the forum in which he wishes to have it tried. I am not sure, and I gravely doubt, that I could restrain him even if I did come to the conclusion that he was conducting a frivolous and vexatious action in the United States of America. As I said, he is not asking any relief from our Courts.

I have read all the cases cited by counsel and I have read others that I think have some bearing on the matter. In para. 125 of vol. 18 of Halsbury, to which I have referred, it will be noted at p. 90, footnote *r*, that: "The Court will give credit to foreign courts for doing justice in their own jurisdiction." I suggested during the course of the argument that if there was a good election and if there is a good statutory defence that should be a perfect defence to the action brought in the United States if the provisions of The Workmen's Compensation Act have any extra-territorial effect. Mr. Phelan said that he would not even advise setting that up as defence in the foreign action. Well, that is a matter for counsel to advise his clients, but it would appear that the plaintiff is seeking, by bringing an action in our Courts, to have a question of defence determined that is open to it to have determined in the foreign Courts where it also carries on business.

There are two cases to which I wish to refer that I think are important. The first is *Pennell v. Roy* (1853), 3 DeG. M. & G. 126, 43 E.R. 50.

There Lord Justice Knight Bruce said at p. 133: "It is not a duty or function, or within the power of this Court, to restrain men from prosecuting frivolous, litigious and desperate suits merely because they are so,—at least unless the experiment shall have been repeated once or twice which is not the case here."

And at p. 139: "If we were to maintain this injunction, we should, as it seems to me, be assuming a jurisdiction in this Court to prescribe the Courts in which parties should bring their suits, without there being anything to affect the conscience of the parties, upon the simple ground that the suits were such as, in the opinion of this Court, ought not to be maintained; and thus we should be bringing under the decision of this Court the question whether suits in other Courts could be maintained,—a question which it is for those Courts, and not for this Court, to decide. To assume such a jurisdiction would, I think, be to exercise a legislative, and not merely a judicial power."



And further down on p. 139 the learned lord justice says: "I have less hesitation in discharging this order because in my opinion, it is, as was expressed by Lord Eldon in *Wright v. Simpson*, [*infra*], the duty of this Court to give credit to foreign Courts for doing justice in their own jurisdiction; and I feel no doubt that if the claim of the Defendant against the assignees be as unfounded as it appears to me to be, the Courts in Scotland have full power to discharge, and will at once discharge, the arrestment."

The case of *Wright v. Simpson* (1802), 6 Ves. 714, 31 E.R. 1272, referred to by the learned lord justice, is an illuminating case with respect to the principles of law to be applied in this case. At p. 730 Lord Eldon, then the Lord Chancellor, said: "With the next passage, that the Courts of that country must be supposed to be deciding according to the laws of that country, I agree to this extent; that natural law requires the Courts of this country to give credit to those of another for the inclination and power to do justice."

It would appear to me that if I were to grant an injunction I would be doing precisely what the authorities say I ought not to do, that is, to adjudicate in our Courts and decide whether or not there is a good cause of action in the action brought abroad.

Mr. Phelan relies on *The Dominion Cannery Limited v. Costanza et al.*, [1923] S.C.R. 46, [1923] 1 D.L.R. 551, and *The Toronto Railway Company v. Hutton*, 59 S.C.R. 413, 50 D.L.R. 785, [1920] 1 W.W.R. 396 (*sub nom. Hutton v. Toronto Railway Company*), for the proposition that it is obvious on the face of it that the question whether there was a good election or not was a matter for the sole jurisdiction of the Workmen's Compensation Board and that no Courts have any power to inquire into that matter and that matter has been adjudicated upon by a tribunal in Ontario that has jurisdiction over that subject-matter. It is not clear to me that these cases have any application. Where the Board has jurisdiction, it is a statutory jurisdiction, and having jurisdiction it has certain powers, but in this case the Board's statutory jurisdiction did not arise until there was a valid election and I think it is a serious matter, to be tried and argued at a trial, whether the Workmen's Compensation Board can give itself jurisdiction by

deciding that there was a good election if in fact there was not a good election.

I put this question to counsel: If Ball's name had in fact been forged to the document could the Board decide that the signature was not a forgery so as to give itself jurisdiction when Ball knew nothing whatever about the signing of the document; or if Ball was in fact in a mental condition such that he could not elect and his mind did not go with his hand, because he had no mind, could the Workmen's Compensation Board, by deciding that he had mental capacity when he had not, give itself jurisdiction to decide that question? I am not called upon to answer either of these questions. But I do say that they do not raise frivolous or vexatious matters. They are serious questions to be argued at a trial and questions on which judges in different Courts might disagree. Likewise, the question whether, by accepting benefits under The Workmen's Compensation Act, Mr. Ball is estopped is a question that depends on facts, and facts can only be determined at a trial. Estoppel and acquiescence are defences and Mr. Ball should not be precluded from calling evidence at a trial in answer to these defences. The question whether The Workmen's Compensation Act has any extra-territorial effect is also a serious question to be tried.

As I have said, all matters that are raised here could be raised in the action in New York by way of defence and if the cases that I have dealt with are good law our Courts must give the Courts of New York credit for doing justice and if these defences are good the plaintiff in this action will be fully protected. Mr. Ball has chosen to bring his action in the State of New York and I do not think he should be restrained by interlocutory injunction from bringing an action wherever he pleases.

It seems to me that a case not referred to in the argument is of some importance with reference to the jurisdiction that I am now called upon to exercise: *The North London Railway Company v. The Great Northern Railway Company* (1883), 11 Q.B.D. 30. This case has been quoted and referred to many times.

The headnote, after quoting from the provisions of The Judicature Act, reads as follows: "Therefore the High Court has no jurisdiction to issue an injunction to restrain a party

from proceeding with an arbitration in a matter beyond the agreement to refer, although such arbitration proceeding may be futile and vexatious."

There it was contended that the defendants were proceeding with a frivolous and vexatious arbitration that was beyond the agreement, but the Court held that it could not restrain them from doing so. At p. 37 Lord Justice Brett, after referring to the provisions of The Judicature Act, said:

"It seems to me that the words 'just or convenient' do not increase the power of any part of the High Court to the extent of altering the rights of parties so as to give to either a right which did not exist in law at all before the Judicature Act. Therefore in my opinion there is nothing in the Judicature Act which enables any part of the High Court to issue an injunction in a case in which before the Judicature Act there was no legal right on the one side or no legal liability on the other at law or in equity. If we were to attempt to stop the appellants here from proceeding with this arbitration it seems to me that we should be putting upon them a burden, and that we should be giving to the respondents a right, neither of which existed in equity or at common law before this statute. What we are asked to do is to take away from the appellants their power of election, if there be any, and to enjoin them against proceeding at their own risk, and at their own expense, without injury to anybody in what, for the purpose of this judgment, we must assume to be an entirely futile arbitration, which would not injure anyone but the appellants."

I may say that I can find no precedent in Canadian jurisprudence or in English jurisprudence, and no precedent has been quoted to me, for an order of the nature I am asked to make.

The granting of an interlocutory injunction is a matter of judicial discretion, but it is a discretion to be exercised on judicial principles. I have dealt with this matter at length because I wish to emphasize how important it is that parties should not be restrained by interlocutory injunctions unless some irreparable injury is likely to accrue to the plaintiff, and the Court should be particularly cautious where there is a serious question as to whether the plaintiff would ever succeed in the action. I may put it in a different way: If on one hand a fair *prima facie* case is made out and there will be irreparable damage if



the injunction is not granted, it should be granted, but in deciding whether an interlocutory injunction should be granted the defendant's interests must receive the same consideration as the plaintiff's.

In this case neither am I convinced that there is a fair *prima facie* case made out that in law the plaintiff is entitled to a final judgment restraining the defendant for all time from proceeding with his action abroad nor am I convinced that if Mr. Ball is permitted to proceed with the action abroad the plaintiff will suffer any irreparable damage. I have already said that the plaintiff in this action can set up abroad all the defences that it claims take away Mr. Ball's right of action in the New York Courts, and under authority of long standing I must acknowledge that the foreign Court will do justice. Therefore the plaintiff in this action will suffer no damage if an injunction is not granted. On the other hand, if the injunction is granted it may well be that the action abroad may be dismissed for want of prosecution and notwithstanding that Mr. Ball is finally successful in this action after it has proceeded through the various Courts, he may in the meantime have lost all his rights in the foreign Court.

I therefore, with utmost deference to my learned brother Danis, order that the interim injunction granted by him be dissolved. This was an injunction granted without hearing counsel for Mr. Ball.

As to the practice of applying for *ex parte* injunctions I think the language of Latchford C.J. in *McCharles v. Wyllie* (1927), 32 O.W.N. 202 at 203, should be ever kept in mind. He said: "In case of emergency an injunction will be granted *ex parte*, but it is very rarely granted without hearing both sides: *Anon.*, [1876] W.N. 12."

At the opening of the argument counsel for the plaintiff moved that the application be turned into a motion for judgment. Counsel for the defendant did not consent. No pleadings have been delivered, no production has been had and there have been no examinations for discovery. I think it would be very improper at this stage to deprive the defendant of his right to a trial of all the issues that may be raised at a proper trial. This motion will therefore be dismissed.

The costs of both motions will be costs to the defendant in the cause.

*Order accordingly.*

*Solicitors for the plaintiff: Lang, Michener & Cranston, Toronto.*

*Solicitors for the defendant: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.*

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[TRELEAVEN J.]

**Regina v. Goodyear Tire & Rubber Company of Canada Limited  
et al.**

*Constitutional Law — Validity of Legislation — Criminal Law and Procedure — Property and Civil Rights — Provision for Prohibiting further Criminal Conspiracies — The Combines Investigation Act, R.S.C. 1927, c. 26, s. 31(1), as re-enacted by 1952, c. 39, s. 3.*

*Criminal Law — Conspiracy in Restraint of Trade — Penalties — Order of Prohibition — Validity of Legislation — When Prohibition to be Granted — The Criminal Code, R.S.C. 1927, c. 36, s. 498, and The Combines Investigation Act, R.S.C. 1927, c. 26, s. 31(1), both as re-enacted by 1952, c. 39, ss. 11, 3.*

Section 31(1) of The Combines Investigation Act (as re-enacted in 1952), which provides that the Court may, "in addition to any other penalty", grant an order prohibiting a repetition of a criminal conspiracy in restraint of trade or combine of which a person has been convicted, is in pith and substance legislation respecting criminal law and procedure, and is therefore *intra vires* of the Parliament of Canada. The prohibition is clearly provided for as a penalty, and it would be a strange situation if Parliament had power to declare such a conspiracy a criminal offence, but had no power to prohibit persons from entering into or continuing it. *The Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396 at 400, quoted and applied. A prohibition should be granted under s. 31(1) if it appears that, notwithstanding that there have been numerous prosecutions and convictions of other corporations under s. 498 of The Criminal Code, and severe financial penalties have been imposed, the convicted corporations have deliberately violated the section. It is clear in such circumstances that the imposition of mere financial penalties is not sufficient to protect the public interest in free competition.

SENTENCES imposed on five corporations on their conviction, on pleas of guilty, of conspiracy in restraint of trade.

8th, 9th and 10th April 1953. The accused were tried by TRELEAVEN J. without a jury at Toronto.

*T. N. Phelan, Q.C., D. D. Carrick and J. M. Magwood, for the Crown.*

*J. J. Robinette, Q.C.*, for Goodyear Tire & Rubber Company of Canada Limited.

*J. D. Arnup, Q.C.*, for Dominion Rubber Company Limited.

*A. S. Pattillo, Q.C.*, and *A. J. MacIntosh*, for Dunlop Tire & Rubber Company Limited and Gutta Percha & Rubber Limited.

*A. E. Maloney*, for B. F. Goodrich Rubber Company of Canada Limited.

25th September 1953. TRELEVEN J. (orally):—The accused have all pleaded guilty to an indictment charging them that they “during the period from 1936 to the 31st day of October 1952, both inclusive, within the jurisdiction of this Honourable Court, did unlawfully conspire, combine, agree or arrange together and with one another and with Barringham Rubber & Plastics Limited; G. L. Griffith & Sons, Ltd.; Viceroy Manufacturing Company Limited; Firestone Tire & Rubber Company of Canada, Limited, and Canasco Limited, to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply in the City of Toronto, in the County of York, and other places throughout the Province of Ontario, and in the City of Montreal, in the Province of Quebec, and other places throughout the Province of Quebec and elsewhere in Canada where the articles or commodities hereinafter mentioned are offered for sale, of articles or commodities which may be the subject of trade or commerce, to wit, belting including transmission and conveyor belting, hose including fire, industrial and garden hose and miscellaneous industrial products including printing and industrial rubber covered rolls and roll coverings, tank and trough and pipe linings, mats, matting and floor coverings, rubber packing, rubber weather stripping, rubber tubing and other mechanical rubber goods, and did thereby commit an indictable offence contrary to the provisions of the Criminal Code, Section 498, subsection 1(d)”.

The accused having pleaded guilty, my only task is to impose the appropriate penalties. By s. 498 of The Criminal Code, R.S.C. 1927, c. 36, as re-enacted by 1952, c. 39, s. 11, the present provision is for “a fine in the discretion of the court”; no minimum or maximum amounts are mentioned. At the time of the commission of the offence, however, the penalty provided was, in the case of a corporation, a fine not exceeding \$10,000 and not less than \$1,000. I have come to the conclusion that the fi-



nancial penalty which should be imposed is the sum of \$10,000 against each of the accused. When one considers the duration of time the agreements have been in existence and the deliberation with which the whole area of the sale of mechanical rubber goods was brought under control, the maximum penalty is not excessive. It was argued on behalf of at least two of the accused that they did not participate to the same extent as the others in carrying out the agreements. That, however, is not a matter of great consequence. The accused were all equally guilty of making the agreements and all participated in carrying them out. The essence of the offence is the illegal agreement.

By s. 31 of The Combines Investigation Act, R.S.C. 1927, c. 26, as re-enacted by 1952, c. 39, s. 3, it is now provided that:

“(1) Where a person has been convicted of an offence under section thirty-two or thirty-four of this Act or under section four hundred and ninety-eight or four hundred and ninety-eight A of the *Criminal Code*

“(a) the court may, at the time of such conviction, on the application of the Attorney General of Canada or the attorney general of the province, or

“(b) a superior court of criminal jurisdiction in the province may at any time within three years thereafter, upon proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purpose of this section,

and in addition to any other penalty imposed on the person convicted, prohibit the continuation or repetition of the offence or the doing of any act or thing by the person convicted or any other person directed towards the continuation or repetition of the offence . . . ”

Pursuant to this provision, application was made at the time of conviction, on behalf of the Attorney General of Canada and of the Attorney-General for the Province of Ontario for an order prohibiting the continuation or repetition of the offence or the doing of any act or thing by the above-named accused or any other person directed towards the continuation or repetition of the offence. I have come to the conclusion that such an order should be made.

It should be borne in mind that there have been several prosecutions and convictions of other corporations under s. 498

of The Criminal Code and severe financial penalties have been imposed. Notwithstanding this, the present accused have deliberately violated the law with regard to the formation of agreements to prevent or lessen unduly competition in the production, manufacture, purchase, barter, sale, transportation or supply of the articles or commodities mentioned in the indictment. It would appear that the imposition of mere financial penalties has not been sufficient to protect the public interest in free competition, and therefore Parliament has passed the above-mentioned legislation providing that, in addition to any other penalty, an order of prohibition may issue.

Counsel for the accused ably and strenuously argue that the legislation providing for this order of prohibition is *ultra vires* of the Dominion Parliament. It is argued that the provision is not, according to its "pith and substance", legislation in relation to criminal law and that it is a colourable attempt by the Dominion Parliament to encroach on the field of contractual rights in the Provinces, which are matters of property and civil rights within s. 92(13) of The British North America Act.

Section 498 of The Criminal Code has on numerous occasions been held to be valid legislation within the jurisdiction of the Dominion Parliament. Section 31(1) of The Combines Investigation Act simply makes provision for prohibiting that which has already been held to be illegal. It would be a strange situation if Parliament had jurisdiction to declare it to be an offence to make agreements to prevent or lessen competition unduly, but had not jurisdiction to prohibit the making of such illegal agreements. Such a situation would be repugnant to reason.

It is also argued, however, that an order for prohibition is not a penalty and therefore not in pith and substance legislation in relation to criminal law. Prohibition may, however, be a penalty and in this case I am satisfied it is a penalty. In the case of *The Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396 at 400, [1941] 3 D.L.R. 305, 76 C.C.C. 227, Duff C.J.C. says:

"As against this it is argued by the Attorney-General of Prince Edward Island that section 285(7) is *ultra vires*; that the legislative prohibition which is there imposed upon convicted persons against driving a motor vehicle or automobile is not within the ambit of section 91(27).

"I may say at once I cannot agree with this view. I do not think anything is to be gained by discussing the point at large. It appears to me to be quite clear that such prohibitions may be imposed as punishment in exercise of the authority vested in the Dominion to legislate in relation to criminal law and procedure."

Parliament has provided that the order of prohibition, if made, is made as a penalty. The exact wording of the legislation is—"the court may . . . in addition to any other penalty imposed on the person convicted, prohibit", etc. The legislation clearly comes within the "pith and substance" test of criminal law and as the Dominion Parliament has jurisdiction in criminal law and procedure, the section must be held to be valid legislation.

The sentence of the Court, therefore, is that each of the above-named accused pay a fine of \$10,000 and an order of prohibition will issue in the following form (I am setting the form out, gentlemen, because of the argument which took place at the time of the conviction):

"Upon the application of the Attorney General of Canada and of the Attorney General of the Province of Ontario for an Order of Prohibition pursuant to Statutes of Canada 1952, 1 Elizabeth II Ch. 39 being an Act to amend the Combines Investigation Act and the Criminal Code, the Prohibition so applied for being in addition to any other penalty imposed on the persons convicted, which application was made at the time of the conviction of The Goodyear Tire & Rubber Company of Canada, Limited; Dominion Rubber Company, Limited; Dunlop Tire and Rubber Goods Company Limited; Gutta Percha & Rubber Limited and The B. F. Goodrich Rubber Company of Canada, Limited, for that the said persons did commit an indictable offence contrary to the provisions of the Criminal Code, Sec. 498(1)(d) as set forth in the indictment and particulars of indictment herein. A copy of the said indictment and particulars thereof is hereto annexed.

"And upon hearing what was alleged by Counsel for the said persons and for the said Attorney Generals

"1. This Court doth prohibit the continuation or repetition of the said offence by the persons convicted.

"2. This Court doth further prohibit the doing of any act or thing by the persons convicted or by any other person directed towards the continuation or repetition of the said offence."



The accused are also condemned to pay the costs incurred in and about the prosecution and conviction for the offence.

The penalties are all the same.

*Judgment accordingly.*

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[GALE J.]

[COURT OF APPEAL.]

**Regina v. Hoyt.**

*Criminal Law—Criminal Sexual Psychopaths—Sufficiency of Evidence—Procedure—Notice—Who is “proper officer”—Notice not Required to be in Writing or State Grounds—Proof of Nomination of Psychiatrist by Attorney-General—Discretion of Trial Judge—Right of Appeal—The Criminal Code, R.S.C. 1927, c. 36, s. 1054A, as enacted by 1947-48, c. 39, s. 43, and amended by 1950, c. 11, s. 19—Limits of Analogy to Procedure in respect of Habitual Criminals, under Part X(A), as enacted by 1947, c. 55, s. 18.*

A finding that an offender is a criminal sexual psychopath may be reviewed on an appeal, by leave, from the sentence imposed in consequence of that finding.

When an Assistant Crown Attorney acts as counsel for the Crown in the prosecution of an accused person, he is the “proper officer of the court” to give notice under s. 1054A(4) of The Criminal Code that evidence will be submitted as to whether the offender is a criminal sexual psychopath. There is nothing in the section requiring that such notice be in writing, or that it set out the grounds on which the prosecution intends to rely, and notice given orally, merely to the effect that such evidence will be submitted, is sufficient.

There must be evidence under s. 1054A(2) that one of the psychiatrists called as a witness on the issue has been nominated by the Attorney-General, and ordinarily that evidence should be given before the evidence of the psychiatrist is received. It is, however, purely formal in nature, and the presiding judge has a discretion to permit the giving of this evidence after the conclusion of the rest of the evidence, and even after making his finding that the offender is a criminal sexual psychopath.

It is dangerous to rely, in proceedings under s. 1054A, on decisions given in proceedings under Part X(A), dealing with habitual criminals, since the differences between the two are so fundamental as to render cases under the latter quite inapplicable to s. 1054A. (*Per* GALE J.)

AN APPEAL from a finding by Gale J., *infra*, that the appellant was a criminal sexual psychopath.

1st and 2nd April 1953. The issue was tried by GALE J. without a jury at Toronto.

A. O. Klein, Q.C., for the Crown.

C. A. Foran, for the accused.

At the opening of the hearing counsel for the accused moved for dismissal on technical grounds, which were disposed of as follows:

1st April 1953. GALE J. (orally):—Mr. Foran has raised three objections to the proceedings on which Mr. Klein wishes to embark. Perhaps at this point I should say that the accused Hoyt was convicted of attempted rape several weeks ago, and Mr. Klein, as Crown Attorney, immediately announced in open court that he intended to adduce evidence under the provisions of s. 1054A of The Criminal Code, R.S.C. 1927, c. 36, as enacted by 1947-48, c. 39, s. 43, and amended by 1950, c. 11, s. 19, to establish that the prisoner is a criminal sexual psychopath. At that time a date two weeks thereafter was fixed for the hearing of the evidence, but the matter was subsequently adjourned until today.

Mr. Foran's first objection is that the notice given by the Crown Attorney did not emanate from "the proper officer of the court" as required by subs. 4 of s. 1054A, and reliance is placed upon *Rex v. Luft*, [1948] 2 W.W.R. 225, 91 C.C.C. 294, 6 C.R. 180, [1948] 3 D.L.R. 680. It seems to me, however, that the observations made by the Court of Appeal of Alberta in that case concerning the interpretation of the phrase "the proper officer of the court" as it appears in s. 575C(4)(b) are to be accepted with some caution having regard to the administrative, jurisdictional and procedural differences which affect the trials of criminal matters in the two Provinces.

In *Regina v. Blackstock*, [1953] O.W.N. 201, our Court of Appeal recently decided that in the particular circumstances which arose there a notice given by the Clerk of the Peace of the County of York in respect of proceedings taken in the County Court Judges' Criminal Court for the County of York was given by the proper officer under s. 575C. I do not read that case as enunciating the principle that the Clerk of the Peace of the County of York is the proper officer mentioned in that section in respect of proceedings brought in the Supreme Court of Ontario and tried in the county of York. Indeed, it tends to confirm my view that the Clerk of the Peace of the County of York is not an officer who has any administrative authority over proceedings in this Court in this county. It would seem to me, in the absence of some other officer being indicated—

and the only other one suggested by counsel for the accused is the clerk of the Court, who is a member of the staff of the Registrar of the Supreme Court of Ontario—that the Crown Attorney is the proper officer within the meaning of s. 1054A so far as proceedings in the Supreme Court of Ontario in the county of York are concerned. He is an agent of the Attorney-General and an officer of the Court. Under The Crown Attorneys Act, R.S.O. 1950, c. 81, the Crown Attorney is also the Clerk of the Peace in other counties, so that a declaration to the effect that the Crown Attorney in this county is the proper officer would at least achieve uniformity throughout the Province. I am of the opinion, therefore, that the notice was given in this instance by the proper officer of the Court.

Mr. Foran's second objection was to the effect that the notice of the intention to present evidence under s. 1054A ought to have been given at least seven days prior to the commencement of the trial upon which the prisoner was found guilty of one of the offences mentioned in subs. 1 of that section, and reference is made by him to authorities decided under the provisions of ss. 575A to 575H. It is my view that the analogy is unsound, and that the only true interpretation to be assigned to s. 1054A is that the notice need not be furnished until after a conviction on the substantive charge has been returned by the jury. The differences between that section and the several sections to be found in Part X(A) of the Code, as enacted by 1947, c. 55, s. 18, are so fundamental as to render the cases under the latter quite inapplicable to the section that I am considering.

The third and most important objection advanced by Mr. Foran was that the notice required by s. 1054A must be in writing, and must set out the particulars or grounds upon which is founded the claim that the convicted person is a criminal sexual psychopath. Again reference was made to s. 575C(4)(b), and to the cases decided under that section, and its counterpart in England, but once again I call attention to the essential differences in the two sections.

Under s. 575C(4) no person shall be tried on a charge that he is a habitual criminal unless "notice has been given by the proper officer of the court by which the offender is to be tried and the notice to the offender shall specify the previous con-



victions and the other grounds upon which it is intended to found the charge". Those words plainly contemplate that the notice is to be in writing, and that the previous convictions and other grounds upon which the charge is made are to be set out with particularity. It is not surprising, then, that many judges have held that any notice under that enactment must be in writing, and must contain particulars.

Section 1054A, on the other hand, simply provides that evidence—and I stress the word "evidence"—shall not be submitted unless seven days' notice has been given to the offender that such evidence will be submitted. It is my view that this language does not require that the notice be in writing, or that grounds or particulars be given. Indeed, there is much to be said for the contention that it is illogical to suggest that particulars be supplied in a notice that evidence is to be adduced. In the circumstances it would mean that the grounds stated would have to be equivalent to an outline of the anticipated evidence, and that is not called for, according to the authorities, even by the provisions of s. 575C. Had those responsible for the section wished to provide that the notice was to be in writing they could have so expressed themselves, as was done, for example, in ss. 993 and 994.

Accordingly, I hold that the notice may be oral, and that a clear statement to the accused that evidence will be adduced to the effect that he is at the time of his conviction a criminal sexual psychopath is sufficient.

In coming to this decision, however, I do not wish to leave the impression that it is my opinion that oral notice is always, and in all circumstances, to be regarded as satisfactory. It seems to me that in most cases written notice ought to be given to the accused with as full particulars as the situation will allow. The matter is an extremely important one from his standpoint, and I think he should be protected to that extent. When this matter was first raised I invited the Crown Attorney to give written notice, but he has not done so. However, I have decided now that the writing is not required by the section, and that the proceedings are not defective because the notice was oral only.

*Objections overruled.*

2nd April 1953. GALE J. (orally):—On the evidence which has been presented to me during the course of the trial yesterday and today I have no hesitation whatever in finding that the accused, Stanley Leigh Hoyt, is a criminal sexual psychopath within the terms of s. 1054A of The Criminal Code.

That expression is defined in subs. 8 as meaning “a person who by a course of misconduct in sexual matters has evidenced a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, loss, pain or other evil on any person.”.

It is not necessary for me to outline the events which took place and which gave rise to the conviction of the prisoner of the offence of attempted rape. It is, perhaps, sufficient if I relate that on the evening in question he induced a young girl aged 12 years, who was obviously not old for her years, into his truck on a pretext, and then drove her for a very considerable distance through the city and out of the city to a lonely and deserted park area at night for the obvious purpose of gratifying an abnormal sexual desire. When he was frustrated in the first instance he continued along his programme, and eventually carried it out by attempting to have sexual intercourse with the child, and later by indulging in a sexual practice which is said to be fairly common in certain circles but which I regard as being definitely out of the ordinary.

It was admitted by the accused that on 27th November 1944 he was convicted of the offence of indecent assault, and there was subsequently filed a certificate to the effect that on the occasion of that conviction the accused unlawfully assaulted a girl under the age of 14 years. It was also admitted that on 9th December 1948 he was convicted at Saint John, New Brunswick, of the offence of indecent assault.

Dr. Tennant, who was called by Crown counsel, testified that he was definitely of the opinion that this man is a criminal sexual psychopath within the scope of that phrase as it is used and defined in the section I am considering. He amplified that opinion by stating that this man does not possess the power to control his sexual impulses to such an extent that it is his opinion that other attacks are likely to be made if the accused is permitted to be at large.

It is unnecessary for me to repeat in detail the reasons assigned by Dr. Tennant for the opinion he expressed. I accept

his opinion, and I think that the reasons on which it is based are reasonable and logical. In the first place, he pointed out that it is quite an abnormal thing for men to attempt to gain sexual gratification with small girls, and that such conduct is all the more significant in this case where the accused appears to be intellectually normal and does not seem to suffer from mental illness. Dr. Tennant also referred to the fact that even though diverted from his course on the evening in question the accused continued with a persistence which could mean only that there was a psychopathic disorder somewhere.

I acknowledge the factor raised by Mr. Foran in his most able defence of the accused, that some part of that persistence might be attributable to the fact that the accused had at some time consumed alcohol, but I also agree with Dr. Tennant and Dr. Hagan that the consumption of that alcohol could not be regarded as the sole reason underlying the persistence of the man in carrying out that which he ultimately did. His refusal to desist is a matter which is of considerable importance.

Dr. Tennant also made reference to the sexual misconduct of the accused after he had attempted to have sexual intercourse with the child, and mentioned it as a manifestation of the abnormality from which this accused suffers. He also places some reliance on the fact that there were two prior convictions, one of which involved a girl under the age of 14 years. He stated—and the conclusion seems to me to be irresistible—that the convictions would indicate to him that the prisoner on a prior occasion was also seeking sexual gratification with a girl of very tender years.

Dr. Hagan expressed a similar opinion, and, generally, for the same reasons.

Dr. Gray was called for the accused, and if I understood his evidence correctly it was that while he was prepared to accept the opinion that the accused was a sexual psychopath—or, perhaps, I might put it better by saying that he thought the accused had sexual psychopathic tendencies—he had considerable doubt as to whether he was a *criminal* sexual psychopath as that term appears in subs. 8 of the section, for the reason that he could not come to a conclusion that there was a habituality about the misconduct, or that the accused had ever evidenced a lack of power to control his sexual impulses.



It would seem to me—and I prefer the evidence of Dr. Tennant to this effect—from the mere fact that the accused did what he did on the night in question, and also was found guilty on two other occasions of indecent assault, that he has exhibited a lack of power to control his sexual impulses because both of the former, though not necessarily implying that there was sexual misconduct involved, demonstrate, to me at any rate, that there was some want of capacity to control the sexual impulses of the accused. Nor am I prepared to accept Dr. Gray's suggestion that there has not been shown here to be a "course of misconduct" on the part of the accused. I would think that the two prior convictions, and the events of the evening in question, clearly show a course of misconduct in sexual matters. I do not see how they could be otherwise described.

Dr. Gray likewise said that in his opinion he could not without considerable doubt come to the conclusion that the accused was likely to attack any other person, or otherwise inflict injury, loss, pain or other evil if he were left at large. That, of course, is a matter of opinion on which there could be no conclusive decision, but I am persuaded that in view of the past and in view of the prisoner's treatment of this girl there is every likelihood of further similar attacks in the future if he is at liberty.

The prisoner here is the type of man against whom society ought to be protected, and in respect of whom this section was passed. If I were to disregard the evidence I have heard, and fail to act upon the section, I would not be doing my duty to the State. I therefore find that Stanley Leigh Hoyt is a criminal sexual psychopath.

That leaves only one matter for consideration. During the course of the evidence Dr. Tennant said he had been appointed by the Attorney-General to examine Hoyt and to report, and his subsequent evidence made it quite clear that he was doing so on 9th February last for the purpose of ascertaining whether or not Hoyt was fit to stand trial. During the course of that examination Dr. Tennant also came to the conclusion that he was a criminal sexual psychopath. Section 1054A(2) requires that before I can make the finding I have just expressed above I must hear at least two psychiatrists who in my opinion are duly qualified as such, and one of whom has been nominated

by the Attorney-General. Let me say at once that I consider, and so hold, that both Dr. Tennant and Dr. Hagan are eminently qualified to give the evidence, but I also have to be satisfied that one of these two persons was nominated by the Attorney-General to give the evidence before me on this issue.

This is not a case where that nomination can be presumed to have been made. I drew this feature of the matter to the attention of counsel for the Crown yesterday, and today there was submitted a document which is marked ex. A for identification purposes, and which purports to be a certificate signed by the Attorney-General to the effect that Dr. Tennant was nominated by him as one of the psychiatrists to examine the prisoner under s. 1054A(2). An invitation to Crown counsel to have that document further proved was declined, apparently on instructions of someone, and the Crown concluded its evidence on this matter without any formal proof of the nomination of Dr. Tennant.

When the matter was argued recently counsel for the Crown indicated that if I ruled that further proof was necessary he would now like the opportunity of supplying it. In view of the position taken earlier in the course of the proceedings I would be inclined to say that it is too late now to attempt to supplement the evidence submitted by the Crown, but I think that the interests of the State override any consideration such as that. Having come to the conclusion that Hoyt is a criminal sexual psychopath I do not think that the want of proof of this document ought to abrogate that finding notwithstanding the position so taken by counsel for the Crown. I therefore give leave to him to submit further proof on that branch of the matter and I will discuss now with counsel when that will be . . .

MR. KLEIN: I do not think I have anything more to say. If your Lordship would permit me to go into the witness-box I think I can prove it to your Lordship's satisfaction.

HIS LORDSHIP: Have you any objection to that, Mr. Foran?

MR. FORAN: Not at all, my Lord.

MR. KLEIN: I might say I have never been in the witness-box before, so I cannot guarantee the results, but I will do my best.

MR. FORAN: As I say, I have no objection to my friend's going into the box, but I am not saying that that will be ade-

quate proof, or that—I am just saying I am not objecting to the Crown Attorney in this case giving evidence. I do not know whether I am clear myself about that, but we discussed that before, as to whether he is competent to give evidence . . .

HIS LORDSHIP: He is competent, but he disqualifies himself in that capacity from that time on. Just before I leave this question of the proof of the document, may I say that I am relying to a considerable extent on that which was said by counsel and Mr. Justice Channell in *Rex v. Turner*, [1910] 1 K.B. 346.

[Mr. Klein then gave evidence proving the signature of the Attorney-General on ex. A, which was then marked ex. 2.]

[His Lordship then proceeded to sentence the prisoner.]

*Judgment accordingly.*

14th and 15th September 1953. The appeal was heard by LAIDLAW, AYLESWORTH and GIBSON JJ.A.

*W. B. Common, Q.C.*, for the Attorney-General, respondent: I have a preliminary objection, that there is no right of appeal in this case.

*P. B. C. Pepper*, for the accused, appellant: *Brusch v. The Queen*, [1953] 1 S.C.R. 373, 105 C.C.C. 340, 16 C.R. 316, [1953] 2 D.L.R. 707, shows that this is an appeal from sentence rather than from conviction. [LAIDLAW J.A.: Where is there a right of appeal from the *finding*?] It would be a very grave thing if there were no right of appeal from such a finding, which involves a deprivation of liberty for possibly the rest of a man's life.

Section 1012(e) of The Criminal Code, R.S.C. 1927, c. 36, defines "sentence" in very broad terms, and surely this judgment is within its terms as an order made on conviction with reference to the person convicted. The sentence includes the finding that the accused is a criminal sexual psychopath: *Rex v. Graves and Rose*, [1950] O.W.N. 238, 97 C.C.C. 16, 9 C.R. 365, applying *Rex v. Jones*, [1929] 1 K.B. 211.

The trial judge, in making his endorsement as to sentence on the indictment, included his finding that the accused was a criminal sexual psychopath. [LAIDLAW J.A.: That is a finding of fact; what makes it an "order" of the Court within the definition of "sentence" in s. 1012(e)?] It is clear under s.



1054A, as enacted by 1947-48, c. 39, s. 43, and amended by 1950, c. 11, s. 19, that the trial judge cannot impose a sentence under subs. 5 unless he makes that finding. [AYLESWORTH J.A.: A comparison of this section with Part X(A), (as enacted by 1947, c. 55, s. 18), and particularly s. 575E, seems to indicate that Parliament has to some extent treated the words "finding", "conviction" and "sentence" as interchangeable.] [LAIDLAW J.A.: Is not your proper approach an appeal from the sentence of three years' imprisonment and an indeterminate term thereafter, which of course cannot stand if the finding that the accused is a criminal sexual psychopath does not stand?] Probably so, and I now ask leave to amend my notice of appeal by adding a request for leave to appeal from the sentence imposed. [THE COURT: The leave to amend will be granted.]

As to the merits:

1. The finding cannot stand because proper notice was not given under s. 1054A(4). There should be (1) a written notice, containing (2) the grounds on which the prosecution relies to establish that the accused is a criminal sexual psychopath, and (3) the names of the two psychiatrists to be called. It is elementary that an accused shall be given notice of the names of the witnesses to be called by the Crown, these names in the ordinary course of things being endorsed on the indictment. Here the evidence of psychiatrists is expressly required, and the accused should have an opportunity to show, if he can, that they are not "duly qualified as such", as required by subs. 2, and he should also have notice so that he can know the purpose for which the psychiatrists visit him, if they do visit him.

2. Crown counsel at the trial was not "the proper officer of the court" within the meaning of s. 1054A(4), and the notice is defective on this ground also. The "proper officer" is, I submit, the Crown Attorney and not an assistant; I refer to The Crown Attorneys Act, R.S.O. 1950, c. 81, s. 14(1). [LAIDLAW J.A.: Does "of the court" in subs. 4 refer to the Court generally, or to the particular Court by which the accused is being tried? If it is the latter, I should think the "proper officer" might well be the person who is actually prosecuting the particular case.]

3. The nomination of Dr. Tennant by the Attorney-General, pursuant to subs. 2, was not properly proved. The trial judge took the extraordinary course of first giving his judgment and

then giving an opportunity to Crown counsel to supply further evidence. He said that "the interests of the State" overrode the accused's ordinary right to have all necessary proof made, but this is surely a most dangerous principle.

4. The evidence did not justify a finding that the accused was a criminal sexual psychopath. The question put to Dr. Tennant was not in the form of a hypothetical question, which the Court, in *Regina v. Tilley*, [1953] O.R. 609, 106 C.C.C. 42, 17 C.R. 1, said was the proper form.

*W. B. Common, Q.C.*, for the Attorney-General, respondent: There is no right of appeal here, since the finding that the appellant is a criminal sexual psychopath is neither a conviction nor a sentence. If the appeal is considered as one from sentence, then it does not lie because the sentence is "one fixed by law", which is expressly excluded under s. 1013(2). The indeterminate portion of the sentence is fixed by law and this Court has no jurisdiction to interfere with it. It is not open to this Court to review the finding that the accused is a criminal sexual psychopath. That finding is clearly not within any part of s. 1013, since it is neither a conviction nor a sentence, as defined in s. 1012(e). There is a *casus omissus* here. Parliament, in s. 575E, expressly provided for an appeal in habitual criminal proceedings, but it made no such provision in this connection.

The finding that the accused is a criminal sexual psychopath is clearly not an "order" such as is mentioned in s. 1012(e). The statute must be carefully examined to see whether Parliament has given jurisdiction to this Court. This is clearly not an "order . . . made on conviction". [AYLESWORTH J.A.: But under s. 1054A(5) sentence is imposed "for the offence of which [the accused] has been convicted".] If the trial judge had found that the appellant was not a criminal sexual psychopath the Attorney-General would have had no right of appeal.

Some assistance can be derived from the line of cases dealing with orders of confiscation of slot machines, such as *Rex v. Miles*, 9 M.P.R. 554, 65 C.C.C. 88, [1936] 1 D.L.R. 186.

The sentence for an indeterminate period is "fixed by law", and therefore not appealable; it is something entirely different from an indeterminate term imposed under s. 46 of The Prisons and Reformatories Act, R.S.C. 1927, c. 163. I refer to *Rex v.*

*De Young; Rex v. Liddiard; Rex v. Darling* (1927), 60 O.L.R. 155, 47 C.C.C. 207.

As to the merits:

1. The section does not require that the notice shall be in writing, and my submission is that oral notice is sufficient. The important thing is that the accused should have notice, and one cannot imagine a more favourable moment for the giving of the notice than that at which it was given here. In ss. 993 and 994 written notice is expressly required. This section requires "notice" *simpliciter*, without setting out any particulars that are to be embodied in it. There could be no possible prejudice from the absence of a written notice.

2. Again, the important thing is that the accused shall get the notice, and the logical person to give it is the counsel who has acted for the Crown at the trial, having, presumably, been appointed by the Attorney-General. He is the "proper officer" to prosecute the accused, and therefore the "proper officer" to take proceedings to indicate the proper punishment to be imposed.

3. The nomination of a psychiatrist is a purely formal matter. No one questioned Dr. Tennant's qualifications, but it was a mere matter of formal proof of his nomination. My submission is that the trial judge might have permitted the filing of the certificate when it was tendered. There are many cases where, in the discretion of the trial judge, evidence has been admitted on most vital matters after counsel for the Crown has closed his case. [LAIDLAW J.A.: You need not pursue that point.]

4. The evidence was ample to support the finding. [LAIDLAW J.A.: You need not argue this point either.]

*P. B. C. Pepper*, in reply: Section 575E, although it is in Part X(A), does not limit its application to that Part, and may cover this appeal. It may be that Parliament deliberately omitted a provision for appeal here because s. 575E was already in the Code, and it was thought unnecessary to make further provision.

*Cur. adv. vult.*

5th October 1953. The judgment of the Court was delivered by

LAIDLAW J.A.:—After trial on the 9th, 10th and 11th March 1953 before Gale J. and a jury, on a charge of rape, the appel-



lant was found not guilty of that offence but guilty of an attempt to commit rape. Counsel for the Crown thereupon related the criminal record of the offender and stated that he wanted then and there to give notice to the offender that evidence would be submitted as to whether the offender was a criminal sexual psychopath. The learned trial judge appointed a day to hear the application made on behalf of the Crown and the application came on for hearing on the 1st April 1953. At that time counsel for the appellant took exception to the proceedings and moved for an order dismissing the application on the ground that the notice required to be given by s. 1054A of The Criminal Code, R.S.C. 1927, c. 36, as enacted by 1947-48, c. 39, s. 43, and amended by 1950, c. 11, s. 19, was not proper or sufficient in law because: (1) it was not given by the proper officer, (2) it was not given seven clear days prior to the commencement of the trial, and (3) it was not in writing. After hearing argument of counsel for both parties, the learned judge dismissed the application made on behalf of the appellant for reasons stated orally by him and set forth in the transcript of proceedings.

After hearing evidence given by two psychiatrists, counsel for the Crown having indicated to the Court that that was all the evidence offered by him, the learned judge pointed out that it had not been proved in evidence that either of the psychiatrists had been nominated by the Attorney-General pursuant to the provisions of s. 1054A. Reference was made to a letter said by counsel for the Crown to have been signed by the Deputy Attorney-General and a statement therein that the Attorney-General acting under the provisions of s. 1054A had nominated Dr. Tennant, one of the witnesses who gave evidence. Counsel for the offender objected that the letter tendered by counsel for the Crown was not sufficient proof of the nomination by the Attorney-General, and the learned judge reserved his decision after hearing counsel for both parties. Evidence, including evidence given by a psychiatrist, was then given on behalf of the offender. No evidence was given in reply.

After hearing further argument as to the sufficiency of proof that one of the psychiatrists called by counsel for the Crown had been nominated by the Attorney-General as required by s. 1054A of The Criminal Code, and also submissions at length as to whether the offender was a criminal sexual psy-

chopath, the Court made a finding that the offender was a criminal sexual psychopath and oral reasons were given for that finding.

After this, the Court again referred to the question in controversy as to the sufficiency of proof that one of the psychiatrists called by counsel for the Crown was nominated by the Attorney-General and gave leave to counsel for the Crown to submit further evidence in proof of the fact. Thereupon counsel for the Crown, without objection by counsel for the offender, offered himself as a witness. He produced and filed as an exhibit a certificate dated 2nd April 1953, purporting to be signed by the Attorney-General for Ontario and showing therein that on 9th February 1953 Dr. Charles S. Tennant, one of the witnesses, was nominated pursuant to s. 1054A(2) of The Criminal Code as one of the psychiatrists to examine Stanley Hoyt to determine whether or not he was a criminal sexual psychopath. He testified that the certificate had been received in the office of the Crown Attorney in due course of the mail and that the signature thereto was the signature of the Attorney-General. After hearing that evidence, the Court sentenced the offender for the offence of which he had been convicted to a term of three years' imprisonment in a penitentiary and for an indeterminate period thereafter as provided by s. 1054A(5).

The appellant gave notice of appeal to this Court against the finding of Mr. Justice Gale that he was a criminal sexual psychopath. When the appeal came on for hearing the question was raised as to whether or not the appellant had a right to appeal to this Court from that finding. Counsel for the appellant thereupon asked for leave to amend the notice of appeal by including therein a notice of application to this Court for leave to appeal from the sentence imposed on the appellant. That leave was granted and the Court thereupon heard counsel on the application for leave to appeal from the sentence and also on the questions in controversy in the appeal. The Court took time to consider the whole matter and I am now prepared to state my views.

The questions raised by counsel for the appellant after trial and in the course of proceedings to have the offender declared a criminal sexual psychopath under s. 1054A are substantial and important. There is little or no precedent for the assistance

of the Court and I find no difficulty in deciding that leave to appeal from the sentence imposed upon the appellant under s. 1054A should be granted by this Court.

The grounds of appeal as set forth in the notice of appeal are as follows:

“(A) The notice given to me was defective in that it did not emanate from the proper officer, it did not set forth with sufficient particulars the allegations against me and was not served within the time limited.

“(B) The finding of the learned trial Judge was unreasonable and cannot be supported having regard to the evidence.

“(C) The learned trial Judge erred in admitting my record of previous convictions.

“(D) The learned trial Judge erred in finding that one of the psychiatrists had been nominated by the Attorney-General for the Province of Ontario.

“(E) The learned trial Judge erred in finding that I had evidenced a course of mis-conduct in sexual matters and a lack of power to control my sexual impulses and as a result I am likely to attack or otherwise inflict injury, loss, pain or other evil on any person.

“(F) Such further and other grounds as counsel may advise.”

I think the appeal fails on all grounds. The Assistant Crown Attorney represented the Crown in the prosecution of the charge leading to the conviction of the accused and the sentence imposed upon him. It may be assumed that the Assistant Crown Attorney was acting under the direction of the Crown Attorney in such proceedings and in so doing had the like powers and was required to perform the like duties as the Crown Attorney. It was his duty to aid in the administration of justice and in my opinion he was the “proper officer” in this Province to do whatever was necessary on behalf of the Crown in the conduct of the trial of the accused on the charge against him and in respect of the commencement and conduct of the proceedings under s. 1054A. Accordingly, the notice required by s. 1054A(4) was given in this case by the proper officer of the Court within the meaning and intention of the section.

There is no express requirement in s. 1054A that the notice shall be in writing and it is not necessary to construe the provisions thereof in such a way as to include such a requirement.



If it had been the intention of Parliament that the notice should be in writing, that intention could and would have been expressed without difficulty.

Likewise, in the absence of express stipulation as to the contents of the notice, I am not willing to hold in accordance with argument of counsel for the appellant that it was not good in law because it did not convey any information to the offender as to the ground upon which the prosecution intended to proceed under s. 1054A.

Finally, I cannot give effect to the objection urged strongly by counsel for the appellant that the finding that the offender was a criminal sexual psychopath was made by the Court before necessary proof was given that one of the psychiatrists called as a witness on behalf of the Crown had been nominated by the Attorney-General. I think it was not beyond the powers of the Court to receive evidence in proof of that fact even after the finding was made. It did not in any way touch the question to be decided by the Court but was merely formal in nature and in proof of a fact stated to the Court by counsel for the Crown. I do not wish my observations to be taken as approval of the course of proceedings to which objection has been taken, because in my opinion evidence in proof of the fact that one of the psychiatrists called by the Crown to give evidence in a proceeding under s. 1054A has been nominated by the Attorney-General should be given before the evidence of the psychiatrist is received by the Court. In the particular circumstances of this case, no substantial wrong has been occasioned to the offender, and this Court ought not to interfere with the finding because of the objection to the course of proceedings.

Counsel for the appellant argued that the finding of the Court was unreasonable. The evidence before the Court amply supports the finding. It is not the function of this Court to review the weight of the evidence or to substitute its opinion for that of the Court below on a question of fact when the finding is fully supported by credible evidence.

In the course of reply, counsel for the appellant referred to s. 575E of The Criminal Code, as enacted by 1947, c. 55, s. 18, and was permitted by the Court to argue that by virtue of the provision in that section an appeal lay to this Court from a finding under s. 1054A that an offender was a criminal sexual

psychopath. I do not now determine that question because leave to appeal from the sentence imposed on the offender as provided in s. 1054A(5) has been granted by this Court in accordance with the application made for such leave by counsel for the appellant.

The appeal to this Court should be dismissed.

*Appeal dismissed.*

*Solicitors for the accused, appellant: Foran and McCreat, Toronto.*

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[COURT OF APPEAL.]

**The Chesapeake and Ohio Railway Company v. Ball.**

*Judgments and Orders — Interlocutory and Final Orders — Necessity for Leave before Appeal from Interlocutory Order — Refusal to Continue Interim Injunction — The Judicature Act, R.S.O. 1950, c. 190, ss. 16, 25 — Rule 493.*

*Appeals — Interlocutory Order — Necessity for Leave — What Orders Interlocutory — Refusal to Continue Interim Injunction — Repeated Applications for Leave — Rule 493.*

An order refusing to continue until trial, and dissolving, an interim injunction is an interlocutory order by virtue of the terms of s. 16 of The Judicature Act, and therefore, under s. 25 of that Act, no appeal lies from such an order except by leave. *Hendrickson v. Kallio*, [1932] O.R. 675 at 678, quoted and applied; *Smith v. Cowell* (1880), 6 Q.B.D. 75; *Easton and Co. v. Nar Valley Drainage Commissioners* (1892), 8 T.L.R. 649, applied.

It is not permissible, after leave to appeal from an interlocutory order has been refused on an application under Rule 493, for the applicant to go to another judge or other judges successively in an endeavour to persuade one of them to give him leave. A refusal of leave is final and not reviewable. *Ex parte Stevenson et al.*, [1892] 1 Q.B. 394, applied; *Re Sarnia Oil Company* (1893), 15 P.R. 347; *Re Solloway Mills & Co. Ltd.*; *Ex parte Solloway*, [1935] O.R. 37 at 47, referred to.

AN APPEAL by the plaintiff from the judgment of McRuer C.J.H.C., *ante*, p. 843. At the opening of the appeal counsel for the defendant, respondent, took a preliminary objection that there was no right of appeal without leave, and that leave had been refused. THE COURT directed that the appeal be argued in all aspects, subject to the preliminary objection. (Note: The argument is noted only in so far as it deals with the preliminary objection.)

24th and 25th September 1953. The appeal was heard by LAIDLAW, AYLESWORTH and GIBSON JJ.A.

*T. N. Phelan, Q.C. (D. A. Lang, with him)*, for the plaintiff, appellant: Believing that the order of McRuer C.J.H.C. was a final order, in view of the fact that the writ in this action asks only for an injunction, and that accordingly we were entitled to appeal without leave, we proceeded with our appeal notwithstanding the refusal of leave by McLennan J. The Court cannot determine whether the order in appeal is interlocutory or final until it has heard argument on all questions in dispute.

*W. B. Williston*, for the defendant, respondent: The order appealed from is clearly interlocutory, and leave to appeal has not been obtained, but has been refused. Section 26 of The Judicature Act, R.S.O. 1950, c. 190, as amended by 1953, c. 50, s. 1, is still "subject to the rules", and does not abrogate the provisions of s. 25. The amendment, made after the decision in *Re LeSieur*, [1951] O.R. 814, [1952] 1 D.L.R. 93, did not change the law in respect of appeals from interlocutory orders, to which s. 26 never referred. Unless the appellant can show that this is a final order it cannot be brought within s. 26, and is still subject to s. 25 and Rule 493. [LAIDLAW J.A.: Can leave to appeal be granted by a judge of this Court notwithstanding the refusal of McLennan J.?] I submit not. I refer to Holmsted & Langton's Ontario Judicature Act, 5th ed. 1940, p. 1294, where it is stated that there cannot be successive applications for leave to appeal. The best authority for this proposition is *Re Sarnia Oil Company* (1893), 15 P.R. 347, and this has been the universal rule in our Courts.

As to the interlocutory nature of the order of McRuer C.J.H.C., I refer to *Stanton v. Canada Atlantic Railway Company* (1885), Coutlee, S.C. Dig. 89; Cameron, Supreme Court Practice, 3rd ed. 1924, p. 22; *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580. The merits of the action have not been in any way determined.

*T. N. Phelan, Q.C.*, in reply: I submit that notwithstanding the refusal of McLennan J. to grant leave, this Court, or any one of its judges, can grant leave under Rule 493.

Leave is not required, however, since the order is final. It finally disposes of the only issue between the parties as set out in the writ: *Guaranty Trust Company of Canada v. Fleming & Talbot*, [1946] O.R. 817, [1947] 1 D.L.R. 184; *Menary v. Menary*, [1942] O.W.N. 417, [1942] 3 D.L.R. 746; *Hill v. Sunny*



*Land Cafe & Co.*, [1931] O.R. 436, [1931] 4 D.L.R. 463; *Ainsworth v. Bickersteth et al.*, [1947] O.R. 525, [1947] 3 D.L.R. 517; *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580. The last-cited case is also authority for the proposition that an unsuccessful application for leave, if it is unnecessary, does not constitute a waiver of a right to appeal without leave.

*C. R. Magone, Q.C.*, for the Attorney-General for Ontario, did not argue on this question.

*Cur. adv. vult.*

7th October 1953. The judgment of the Court was delivered by

LAIDLAW J.A.:—A motion on behalf of the plaintiff was made before the Chief Justice of the High Court, sitting in Court, for an order that an injunction granted *ex parte* by Mr. Justice Danis be continued until the trial or other final disposition of the action or until further order. Upon return of the motion, an application was made for an order that the motion be turned into a motion for judgment. On the 3rd September 1953 the Court ordered that the injunction granted by order of Mr. Justice Danis be dissolved and that the motion to continue the injunction be dismissed; also that the motion on behalf of the plaintiff pursuant to Rule 220 to direct that the application be turned into a motion for judgment be dismissed.

The plaintiff forthwith gave notice of appeal to this Court from the order made by the Chief Justice of the High Court. Thereafter, under date of the 9th September 1953, notice was given on behalf of the defendant showing particulars of points proposed to be brought into question by him in respect of the constitutional validity of certain sections of The Workmen's Compensation Act, R.S.O. 1950, c. 430. Subsequently an application was made on behalf of the plaintiff to Mr. Justice McLennan for leave to appeal from the order made by the Chief Justice of the High Court and leave to appeal therefrom was refused on the 18th September 1953.

When the case came on for hearing in this Court the Court, counsel for the defendant not objecting, acceded to the request of plaintiff's counsel that the Court should hear argument on all questions in controversy, subject, however, to the preliminary

objection made by the defendant's counsel that no appeal lay without leave and leave to appeal had been refused.

It is my opinion that the objection taken by counsel on behalf of the defendant is good in law and must be given effect. The power of the Court to grant the injunction sought by the plaintiff on motion before the Chief Justice of the High Court is contained in s. 16 of The Judicature Act, R.S.O. 1950, c. 190, in the following words:

“ . . . an injunction may be granted . . . by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made . . . ”

It has been held that the words “interlocutory order” in that section mean, when applied to an order for an injunction, any order other than final judgment, whether made before or after final judgment: *Smith v. Cowell* (1880), 6 Q.B.D. 75; *Easton and Co. v. Nar Valley Drainage Commissioners* (1892), 8 T.L.R. 649, referred to in *Holmsted and Langton's Ontario Judicature Act*, 5th ed. 1940, at p. 98.

I refer also to *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580, where Middleton J.A., at p. 678, said: “The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties—the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.”

The order made by the Chief Justice of the High Court refusing to continue the interim injunction was an interlocutory order and s. 25 of The Judicature Act prohibits an appeal from that order save by leave as provided in the Rules. That part of the order made by the Chief Justice of the High Court that dismissed the application to turn the motion made on behalf of the plaintiff into a motion for final judgment was also interlocutory and no appeal lies from it to this Court save by leave.

Counsel for the plaintiff then argued that this Court, or any one of the judges thereof, has power to grant leave to appeal from the order of the Chief Justice of the High Court, notwithstanding the refusal of Mr. Justice McLennan to grant such leave. I cannot accept that argument. It is expressly provided by Rule 493 that upon an application for leave to appeal

from an interlocutory order such leave shall not be granted unless certain conditions, as therein set forth, are satisfied. It is necessary by reason of the provisions of that Rule for an applicant to obtain a favourable opinion of the judge hearing the application in respect of certain matters. It is plain that no appeal lies from an order made upon an application for leave to appeal and the relevant principles are discussed fully in *Ex parte Stevenson et al.*, [1892] 1 Q.B. 394. It is equally plain to me that an applicant who has been refused leave to appeal from an interlocutory order cannot thereafter make successive applications to each and every other judge and thus in reality apply as often as he chooses with a view to obtaining an opinion contrary to that of the judge who first heard the application. Such a practice would be frivolous, vexatious and intolerable. The Court was referred to *Re Sarnia Oil Company* (1893), 15 P.R. 347. The opinion expressed in that case was adopted by Masten J.A. in *Re Solloway Mills & Co. Ltd.*; *Ex parte Solloway*, [1935] O.R. 37 at 47, [1935] 1 D.L.R. 340, 16 C.B.R. 161.

Because of my opinion in the matter of the preliminary objection to the hearing of this appeal, I do not discuss any other question in controversy between the parties.

The order of this Court should be that the appeal be quashed with costs of an application for that order, to be paid by the plaintiff to the defendant and to the Attorney-General for the Province of Ontario.

*Appeal quashed.*

*Solicitors for the plaintiff, appellant: Lang, Michener & Cranston, Toronto.*

*Solicitors for the defendant, respondent: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.*

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## [COURT OF APPEAL.]

**Bradburn v. Bradburn and Cotton.**

*Evidence — Privilege — Questions Tending to Show Commission of Adultery — Whether Proceedings “instituted in consequence of adultery” — Action for Divorce, with Claim for Custody of Children — Examination for Discovery of Defendant Spouse — The Evidence Act, R.S.O. 1950, c. 119, s. 8.*

*Divorce and Matrimonial Causes — Discovery — Privilege — Questions Tending to Show Commission of Adultery — Scope and Extent of Privilege — The Evidence Act, R.S.O. 1950, c. 119, s. 8.*

The application of s. 8 of The Evidence Act is settled by the judgment of the Court of Appeal in *Livingstone v. Livingstone et al.*, [1945] O.W.N. 623, where it is pointed out that the enactment is a protective one and must be scrupulously observed.

A wife sued for divorce and for custody of the infant children of the marriage, basing her claim for custody upon an allegation that the husband, by reason of his misconduct and immorality, was not fit to have the children.

*Held*, the proceedings, in so far as they related to custody as well as on the claim for divorce, were “instituted in consequence of adultery”, and therefore the defendant husband, on his examination for discovery, was not liable to be asked or bound to answer any question tending to show that he was guilty of adultery; it made no difference in this connection that the questions were related to the issue of custody rather than that of divorce.

*Booth v. Booth and Cook*, [1949] O.R. 80, disapproved.

AN APPEAL by the defendant husband, in an action for divorce and custody, from an order of Smily J., dismissing an appeal from an order of Marriott, Senior Master, requiring the appellant to re-attend on his examination for discovery and answer further questions.

15th and 16th September 1953. The appeal was heard by HOPE, HOGG and F. G. MACKAY JJ.A.

G. T. Walsh, Q.C. (J. C. N. Currelly, with him), for the defendant husband, appellant: It is true that the plaintiff in this action claims not only divorce but also custody of the children, and alimony, but we submit that we are nevertheless entitled to the protection of s. 8 (formerly s. 7) of The Evidence Act, R.S.O. 1950, c. 119, since the whole action, and in particular the claim for custody as well as that for divorce, was “instituted in consequence of adultery” within the meaning of that section.

The Senior Master in this case, as in *White v. White and Griffiths*, [1951] O.W.N. 439, considered himself bound by the decision of Gale J. in *Booth v. Booth and Cook*, [1949] O.R. 80, but our submission is that the *Booth* case was wrongly decided, and we ask this Court to overrule it.

In *Livingstone v. Livingstone et al.*, [1945] O.W.N. 623, [1945] 4 D.L.R. 121 (where, as in the *Booth* case, the defendant wife set up a counterclaim) it was held that the defendant was not required to offer any evidence against her will in disproof of adultery. It was stated that two cardinal principles apply to all actions instituted in consequence of adultery. The first rule, as laid down in *Franklin v. Franklin and Minshall*, [1921] P. 407 at 411, is that the burden is on the plaintiff to prove adultery, and not on the defendant to disprove it. The second rule, pointed out in *Redfern v. Redfern*, [1891] P. 139 at 149, is that there is no power in the Court to compel a witness to give evidence tending to show that he or she has been guilty of adultery.

We refer also to the following cases: *Martin v. Martin* (1923), 24 O.W.N. 323; *Mulholland v. Misener* (1895), 17 P.R. 132; *Taylor v. Neil* (1896), 17 P.R. 134; *Pascoe v. Pascoe et al.*, [1937] O.W.N. 645; Latey on Divorce, 14th ed. 1952, p. 406.

If the rule were otherwise than as we submit, a plaintiff might bring an action for divorce with very little, or no, evidence, but, by adding another cause of action under Rule 774, might be able to obtain on discovery evidence that would entitle him to a divorce.

*R. O. Standish*, for the plaintiff, respondent: The questions we wish to ask the appellant arise from his counterclaim for custody. The counterclaim is a separate action, and is not "instituted in consequence of adultery", but is based upon misconduct of a lesser degree. The appellant is therefore not within the protection of s. 8 of The Evidence Act.

I rely on the following cases: *Taylor v. Neil* (1896), 17 P.R. 134; *Sneyd v. Sneyd and Burgess* (1925), 42 T.L.R. 106.

*G. T. Walsh, Q.C.*, did not reply.

*Cur. adv. vult.*

14th October 1953. The judgment of the Court was delivered by

HOGG J.A.:—This is an appeal from the order of Mr. Justice Smily dated 7th May 1953, by which he dismissed an appeal made by the appellant Bradburn, a defendant in the action, from that part of the order of the Senior Master, dated 27th April 1953, directing the said appellant to re-attend upon his examination for discovery and answer certain questions which he refused to

answer upon a prior examination upon the ground that they might tend to show he was guilty of adultery. By an order made by Mr. Justice Wells on the 25th May 1953 leave was given to the appellant to appeal to this Court from the order of Smily J.

The Master considered that he was bound by the decision of Mr. Justice Gale in *Booth v. Booth and Cook*, [1949] O.R. 80, and it was upon the authority of this decision that the appellant was directed to re-attend and answer the questions which had formerly been put to him.

Section 8 of The Evidence Act, R.S.O. 1950, c. 119, reads as follows:

“The parties to any proceeding instituted in consequence of adultery and the husbands and wives of such parties shall be competent to give evidence in such proceeding; provided that no witness in any proceeding whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery.”

The decision to be made by this Court depends upon the construction and meaning to be placed upon the words “any proceeding instituted in consequence of adultery” as they appear in the section.

The action was instituted by the respondent, Mrs. Bradburn, against her husband, the appellant, and the co-defendant for the dissolution of her marriage on the ground of the adultery of the appellant, and for the custody of the infant children of the marriage. Paragraph 13 of the statement of claim reads as follows:

“The plaintiff claims the custody of the infant children of the marriage on the ground that the spouse defendant by his misconduct has become disentitled to such custody, and that it would be distinctly harmful to the morals and welfare of the said infant children to live in the immoral environment of the male defendant. That the plaintiff will be in a position to give a good home, proper care, and a moral environment to the said infant children.”

The claim for custody is made upon the ground that the appellant, by his misconduct and immorality, is not fit to have the children in his charge, that is to say, the claim made by



the respondent for the custody of the children is based solely upon the adultery of the appellant and the consequences of such adultery. Putting the claim of the respondent for custody in other, and possibly simpler words, the ground upon which custody is claimed is the adultery of the appellant. It is for this reason that it is alleged in the respondent's statement of claim that the appellant has disintitiled himself to have the custody of the children, and that it would be harmful for them to live with him and be exposed to the immoral environment brought about by his misconduct. No other misconduct than adultery is alleged in the statement of claim, nor are there circumstances of other immoral practices.

The conclusion which we have reached is that it is clear from the pleadings that the proceedings were instituted by the respondent, not only for dissolution of the marriage, but, as well, for the custody of the children, in consequence of the adultery of the appellant.

The proceeding in which custody of the children is claimed falls squarely within the ambit of the said s. 8 of The Evidence Act as being instituted in consequence of adultery, and such being the case, the appellant is not liable to be asked or bound to answer any question tending to show that he is guilty of adultery.

In *Booth v. Booth and Cook*, *supra*, the plaintiff husband claimed dissolution of the marriage on the ground of adultery and the defendant wife, by counterclaim, asked to be awarded the custody of the children of the marriage. It was held by Mr. Justice Gale that the section of The Evidence Act in question was not applicable to protect the defendant from being asked questions about her alleged improper relations with her co-defendant. He concluded that the counterclaim was not "a proceeding instituted in consequence of adultery" and furthermore he was of the opinion that the defendant wife could be examined on the issue of custody even if there were no counterclaim and the issue arose only as incidental to an action for divorce. In the present case allegations supporting the claim for custody are made not only by counterclaim but also by the respondent in her statement of claim.

The judgment of this Court in *Livingstone v. Livingstone et al.*, [1945] O.W.N. 623, [1945] 4 D.L.R. 121, settled the appli-

cation of what is now s. 8 of The Evidence Act in respect of circumstances similar to those of the case now under consideration. This judgment was cited on the hearing of this appeal but apparently had not been brought to the attention of Gale J. in the *Booth* case, or to the attention of the Master and Smily J. in the present proceedings.

The action was one for dissolution of marriage on the ground of adultery. The defendant wife pleaded a denial of the alleged adultery and set up a counterclaim for alimony. On her examination for discovery she refused to answer certain questions directed to the issue in respect of alimony, on the ground that they tended to show she had been guilty of adultery. An order was made by a Local Master that she re-attend and answer the questions formerly put to her, and this order was affirmed by Plaxton J. Leave was granted to appeal to this Court and on the appeal it was held that the proceeding was instituted in consequence of adultery and the order directing the defendant to attend for re-examination was set aside. McRuer J.A. (now C.J.H.C.), in a carefully considered judgment with which Roach J.A. concurred, said that at no stage of the proceedings should the defendant wife be called upon to offer any evidence in disproof of adultery, against her will. The learned judge quoted the words of Bowen L.J. in *Redfern v. Redfern*, [1891] P. 139, to the effect that no power existed down to The Divorce Act and no power had been given since by legislation to compel a witness to make any answer on oath which would tend to show he or she was guilty of adultery. At the time judgment was delivered in the *Redfern* case, s. 3 of the Act for the Further Amendment of the Law of Evidence, 32 & 33 Vict., c. 68, was in force in England. This section is almost identical in its language with s. 8 of our Evidence Act. Mr. Justice McRuer further said:

"If an answer tends to prove adultery, it is barred, notwithstanding that it may tend to prove something else at the same time. . . .

"The statute is a protective statute and must be scrupulously observed. The onus is on the plaintiff to prove adultery without assistance from the defendant, unless that assistance is willingly given."

For the reasons stated, the appeal should be allowed with costs and the order of the Senior Master that the appellant

should re-attend before the special examiner to answer the questions which he refused to answer on his prior examination for discovery, and the order of Smily J. should be set aside with costs to the appellant.

*Appeal allowed with costs.*

*Solicitors for the plaintiff, respondent: Carley, Standish, Clarke & Carley, Peterborough.*

*Solicitors for the defendant Bradburn, appellant: Currelly & Foster, Peterborough.*

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[SCHROEDER J.]

### Carnochan v. Carnochan.

*Husband and Wife — Questions as to Title or Possession — Summary Application — Discretion of Court — Principles Governing Exercise of Discretion — Right of Wife to Occupy Matrimonial Residence — Consent of Statutory Committee of Husband — Proceedings in Nature of Action of Ejectment — The Married Women's Property Act, R.S.O. 1950, c. 223, ss. 7, 12 — The Mental Hospitals Act, R.S.O. 1950, c. 229, ss. 66, 74.*

In proceedings by a husband under s. 12 of The Matrimonial Causes Act for an order for possession of the matrimonial residence, occupied by the wife, the Court has a discretion, to be exercised judicially in the light of all the circumstances of the case, and if, on a consideration of all those circumstances, it appears that it would not be just to make an order for possession against the wife, such an order will be refused. *Hutchinson v. Hutchinson*, [1947] 2 All E.R. 792; *Lee v. Lee*, [1952] 2 Q.B. 489n; *Bendall v. McWhirter*, [1952] 2 Q.B. 466, applied.

A husband cannot maintain an action for possession against his wife, based upon an allegation that the wife wrongfully entered into possession and retained it, nor can he claim damages in the nature of mesne profits, since such an action is the modern equivalent of the action of ejectment, an action in tort, and therefore not maintainable between spouses under s. 7 of The Matrimonial Causes Act. *Bramwell v. Bramwell*, [1942] 1 K.B. 370; *Minaker v. Minaker*, [1949] S.C.R. 397, applied.

TRIAL of an issue.

7th, 8th and 9th October 1953. The issue was tried by SCHROEDER J. without a jury at Ottawa.

*John Mirsky*, for the plaintiff.

*H. P. Hill, Q.C.*, for the defendant.

16th October 1953. SCHROEDER J.:—The plaintiff husband originally sued his wife to recover possession of a house known for municipal purposes as 53 Renfrew Avenue, in the city of



Ottawa, together with damages for mesne profits and for other relief. When the action came into the hands of his present solicitors, they advised him, in view of the judgment of the Supreme Court of Canada in *Minaker v. Minaker*, [1949] S.C.R. 397, [1949] 1 D.L.R. 801, that it was more than doubtful whether such an action was maintainable, in that, being a proceeding for wrongful detention and possession of lands, which is the modern equivalent of the old action of ejectment, such an action sounded in tort and was barred by s. 7 of The Married Women's Property Act, R.S.O. 1950, c. 223. In conformity with the decision of the Supreme Court of Canada in that case, the plaintiff applied for an order for the trial of an issue pursuant to s. 12 of The Married Women's Property Act and on 9th June 1953 Mr. Justice Chevrier made an order, in which it was provided that the following issues were to be determined:

"(a) The right of the Plaintiff to an Order for possession of premises known for municipal purposes as 53 Renfrew Avenue in the City of Ottawa in the County of Carleton.

"(c) The right of the Plaintiff to the sum of Nine Thousand Seven Hundred and Thirty-seven (\$9,737.00) Dollars or any portion thereof for the use and occupation by the Defendant of said premises 53 Renfrew Avenue from the 1st day of May, 1940 to the date of the trial of the issue.

"(c) The right of the Defendant to any alleged arrears of payments under the provisions of a Deed of Separation bearing date the 1st day of September, 1939 executed by the parties hereto."

Pleadings were delivered in accordance with Mr. Justice Chevrier's order and the defendant's claim for arrears under the deed of separation was made the subject of a counterclaim by her.

The parties were married in the month of May 1918, and took up residence in Ottawa, where they lived together until the separation between them which occurred in 1939 in the circumstances hereinafter mentioned. One child, Margaret Carnochan, was born of this union on the 8th February 1933. From the time of the separation until the present time she has lived and still continues to live with her mother.

In the month of April 1925 the husband purchased the house which is the property in question, and he and his wife moved

into it at the time it was acquired and they continued to live in it until 1939.

The plaintiff was a mining engineer by profession and was in the service of the Government of Canada in that capacity. It would appear that towards the end of the period of cohabitation between these parties differences arose between them, the nature of which was not disclosed in the evidence. Counsel attended me in chambers and explained that they did not wish to adduce any evidence bearing on this phase of the matter since the circumstances were very painful and distressing to the wife and daughter, and the husband would in all likelihood persist in an attitude which he had taken against his wife and daughter for years, which it was undesirable to have aired publicly, particularly in view of the fact that it might involve innocent persons who were not parties to the action. In any event, the husband was suffering from a mental disorder which resulted in his being committed to the provincial mental hospital at Brockville, Ontario, in December 1939. In July of that year his wife and daughter took a holiday at a summer cottage owned by the wife's brother. I can only conclude that life with her husband was becoming increasingly unpleasant and unhappy if not altogether intolerable in consequence of his mental condition and the fixed delusion which obsessed him so far as his wife and the child of their marriage were concerned. On 1st September 1939 the parties entered into a separation agreement. In the negotiations leading up to the making of the agreement the plaintiff was represented by Mr. T. A. Beament, K.C., and the defendant by the late Mr. H. P. Hill, K.C., Sr. Prior to their entering into this agreement, an order had been made by the judge of the Family Court in the city of Ottawa directing payment by the husband of \$80 per month for the support of his wife and child. Under the separation agreement the husband agreed to sell to the wife an undivided one-third interest held by him in a residence on Percy Street in the city of Ottawa for \$2,000. This part of the agreement has been executed. It would appear that from the sum of \$2,000 payable for this property there was deducted the sum of \$160, being the arrears due by the plaintiff under the order of the judge of the Family Court, but no payment was ever made by him pursuant to the separation agreement which provided for payment by the husband of \$80 upon the execution and de-

livery of the separation agreement and of \$80 per month on the first of September and on the first day of each month thereafter. It should be mentioned that from the time of her return to Ottawa after having spent the summer in her brother's cottage Mrs. Carnochan did not return to the Renfrew Avenue home. She made a division of the furniture, taking such part of it as she desired, and she and her daughter moved into the home of Mrs. Carnochan's mother. In the meantime, while the plaintiff was an inmate of the Ontario Hospital at Brockville, the house was occupied by a Mrs. Bracken who remained in occupation until 1st May 1940, and on the latter date Mrs. Carnochan took possession of the house and of all its contents. She and her daughter have lived there since that date and are still occupying it.

On her examination for discovery, which was read into the record by the plaintiff's counsel, Mrs. Carnochan stated that when she saw her solicitor, Mr. Hill, before taking possession of the premises, he said to her: "Go back to your home and take your little girl and the Public Trustee will look after you." She also testified that she had received the key of the house from Mr. Hill.

Her attitude towards the separation agreement may be gathered from certain statements made by her in her examination for discovery. She said that during the first 12 or 14 months after she had entered into possession of this house the Public Trustee paid her \$140 per month in addition to allowing her to have free use and enjoyment of the matrimonial residence, the Public Trustee paying all taxes and other operating expenses. After the lapse of that period the husband's salary was no longer being paid by the Government of Canada and the Public Trustee requested Mrs. Carnochan to accept a reduction in her allowance to \$50 per month. This was paid to her for one year, and thereafter she received nothing from her husband or from the Public Trustee. When asked if she had ever requested the Public Trustee for payment of further moneys, she said: "No, they [meaning the Public Trustee] told me that that separation had been washed out." In another portion of the examination for discovery, she said: "I never mentioned this separation agreement. I understood it was washed out—never anything being paid on it. I was given to understand and that's the first thing they told me right off



the bat—the Public Trustee will look after you. Now, this does not exist any more.” The position was then that after the Public Trustee ceased to make monthly payments to the wife, which was done at the plaintiff’s instigation, he permitted her daughter and her to occupy the premises while he paid the taxes and, of course, she made no payment of any kind for use or occupation.

I do not think that it can be seriously argued that the separation agreement is still binding upon the parties. Neither party has insisted upon its performance for a long period of time so that it must be inferred that they intended to abandon it altogether. When the defendant returned to the matrimonial residence and accepted these other benefits which were provided for her, she entered into an agreement which was inconsistent with the terms of the separation agreement. I must therefore treat the agreement of 1st September 1939 as no longer having any binding force or validity.

It is obvious that, in so far as the plaintiff’s claim to possession is based upon the allegation that his wife wrongfully entered into possession of the property and wrongfully retained possession, as well as for damages in the nature of mesne profits, this action cannot be maintained.

In *Bramwell v. Bramwell*, [1942] 1 K.B. 370, [1942] 1 All E.R. 137 at 138, Goddard L.J. said: “I only want to add one word upon a matter which I raised during the argument and also on a point which counsel for the appellant made as to the effect of treating this as a summons under the Married Women’s Property Act, 1882. An action for the recovery of land is the modern equivalent of an action of ejectment. An action of ejectment was a personal action and could only sound in damages. Then it became a mixed action, in which not only damages but the property itself could be recovered, and it is preserved now in the action brought in the High Court, and, I think, in the county court, because a claim for *mesne* profits can be joined with an action for the recovery of the land, and *mesne* profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant. It is not necessary to decide it in this case, but I have the greatest doubt as to whether a husband can bring an action for the recovery of land against his wife in these circumstances, alleging that she is wrongly in occupation of the land, because, if

she is wrongly in occupation of the land and he has a right to eject her, then it seems to me she is a trespasser, and the Married Women's Property Act, 1882, s. 12 expressly says that a husband cannot bring an action of tort against his wife."

The decision of the Supreme Court of Canada in *Minaker v. Minaker*, *supra*, is authority for the same proposition.

Nor do I think that the plaintiff is entitled to recover on the footing that, there being no arrangement under which payment of rent, properly so called, had been made, the case was one in which the law would imply from the conduct of the parties a promise to compensate the plaintiff for his loss by reason of the defendant's occupation of his premises. It is not established that the defendant took possession of this property with the express permission of the Public Trustee who was at that time the statutory committee of the plaintiff, but shortly after she took possession the Public Trustee became fully aware of that fact and he sanctioned the continuance of the arrangement as already mentioned. Under s. 66 of The Mental Hospitals Act, R.S.O. 1950, c. 229, the Public Trustee became the committee of the estate of the plaintiff and he continued to act as such committee until the plaintiff's discharge from the Ontario Hospital at Brockville on 4th July 1951. By voluntary arrangement entered into between the plaintiff and the Public Trustee, the latter is still administering the plaintiff's affairs. It should be stated that during the intervening period the plaintiff was permitted to be out of the mental institutions in which he had been from time to time confined, but the only conclusive evidence of his discharge is that contained in a letter dated 17th July 1952, to the filing of which as an exhibit both parties consented, which gives the date of his discharge as 4th July 1951.

Section 74 of The Mental Hospitals Act provides: "The Public Trustee as statutory committee of a patient shall have and may exercise all the rights and powers with regard to the estate of the patient that the patient would have if of full age and of sound and disposing mind."

It would follow that the acts of the Public Trustee as statutory committee of the plaintiff are binding upon the plaintiff. Even if it were made to appear that the plaintiff had made a proper demand for possession of the property, such demand

did not give rise either to a claim for mesne profits or to compensation for use and occupation. In any event, the circumstances in which the wife and daughter were let into possession and were permitted to continue in possession, having regard to the relationship of husband and wife existing between the plaintiff and the defendant and all the other relevant facts, do not raise any implied contract under which it could be said that the defendant was obliged to pay reasonable compensation for use and occupation of the premises. Having regard to the fact that for more than ten years the defendant has enjoyed the use of this property, during only the last two years of which period of occupancy she has had to pay the municipal taxes, it can hardly be contended that she did not enjoy the use of the matrimonial residence as of right.

The proceedings now before the Court are brought under the provisions of s. 12 of The Married Women's Property Act, which reads:

"In any question between husband and wife as to the title to or possession of property, either party . . . may apply in a summary way to a judge of the Supreme Court or at the option of the applicant irrespectively of the value of the property in dispute, to the judge of the county or district court of the county or district in which either party resides, and the judge may make such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit or may direct the application to stand over from time to time, and any inquiry or issue touching the matters in question to be made or tried in such manner as he thinks fit."

The Married Women's Property Act of England, 1882, 45 & 46 Vict., c. 75, contains a somewhat similar provision in s. 17, which reads:

"In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court



of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time and any inquiry touching the matters in question to be made in such manner as he shall think fit."

The meaning and effect of this particular provision of the English Married Women's Property Act has been judicially determined in several cases in recent years and it will be useful to refer to a few of them.

In *Hutchinson v. Hutchinson*, [1947] 2 All E.R. 792, Denning J. (as he then was) held that in proceedings taken under s. 17 of The Married Women's Property Act for an order for possession of a house the Court had a discretion which of course had to be exercised judicially. The fact that the wife had obtained a decree for judicial separation did not make any difference as the parties still remained husband and wife. In exercising his discretion Denning J. said that he was satisfied that it would be unjust to turn the wife and son out of their home.

The matter was again considered in *Lee v. Lee*, [1952] 2 Q.B. 489, [1952] 1 All E.R. 1299, and Denning L.J. (as he had then become) reviewed many of the more recent English cases in *Bendall v. McWhirter*, [1952] 2 Q.B. 466, [1952] 1 All E.R. 1307. In the latter case, at p. 477, Denning L.J. stated: "... the right of a deserted wife to stay in the matrimonial home proceeds out of an irrevocable authority which the husband is presumed in law to have conferred on her. This accounts for the fact that the husband cannot turn the wife out. It also accounts for the fact that, as against the landlord, the wife must assert her right in the husband's name. The authority which is thus conferred on her is an authority to stay in the house until the court orders her to go out. This authority flows from the status of marriage, coupled with the fact of separation owing to the husband's misconduct. It ceases when the marriage comes to an end by death or divorce."

It would seem, therefore, that the right of a deserted wife to stay in the matrimonial home proceeds out of an irrevocable personal licence which the husband is presumed in law to have

conferred on her. In *Bendall v. McWhirter* her occupation is said to be comparable with that of a contractual licensee save that her licence is not revocable except by an order of the Court.

It has been established that the wife's personal income amounts to approximately \$1,100 a year. The husband's unearned income, part of which is derived from \$25,000 in cash on deposit with the Public Trustee, could easily be increased to \$1,500 or \$1,600 a year, and if he were entitled to the net rents of this house he would have an unearned income of approximately \$2,000 per annum. No evidence was adduced as to his ability or inability to engage in gainful employment. The house is a 2½-storey solid brick building, with a living-room, a dining-room and kitchen downstairs, and four bedrooms and a bathroom on the second floor. The rental value for the relevant period was proved to be as follows:

|                                      |   |                   |
|--------------------------------------|---|-------------------|
| 1st January 1940 to 30th May 1947    | — | \$55.00 per month |
| 1st June 1947 to 31st January 1950   | — | \$60.50 per month |
| 1st February 1950 to 31st March 1952 | — | \$71.39 per month |
| 1st April 1952 to 30th May 1953      | — | \$75.00 per month |

It must be borne in mind that the wife's right to continue to live in this house does not give her the right to prevent her husband from sharing the accommodation which it affords. In point of fact, in the instant case the wife is prepared and willing to have her husband come to live with her and her daughter, but he does not choose to do so. As previously mentioned, the separation agreement between the husband and wife has been abandoned and her right to alimony is therefore not modified or affected in any way by its terms. The plaintiff contended in the course of the trial that the agreement had in fact been abandoned and he, of course, acquiesces in this view.

Undoubtedly in any proceeding brought before the Court under s. 12 of The Married Women's Property Act a discretion is vested in the Court and the Court must determine in this case whether or not its discretion ought to be exercised in favour of the husband or in favour of the wife. What is vested in the Court is a discretionary power which must be exercised judicially in the light of all the circumstances connected with the case. After giving all relevant matters the most earnest and anxious consideration, I am satisfied that it would be unjust to make an order for possession against the defendant wife.

The husband has no intention of returning to the matrimonial residence to live there either alone, if he were placed at liberty to do so, or with his wife and child. He intends to rent the property or to convert it into apartments and offer the same for rent. I am convinced that his wife must have been greatly distressed in the unhappy state of her matrimonial life, especially in the few months immediately prior to the separation. The husband, in my view, is taking a harsh attitude towards his wife and child and is most unreasonable in anything which touches and concerns their relationship. I have the distinct impression that he derives immense satisfaction from causing embarrassment and annoyance to his wife and would desire nothing more than to carry on endless litigation with her. Even if I were disposed to give him possession subject to an obligation on his part to provide alternative accommodation for the defendant, I am satisfied that what would be adequate alternative accommodation could never be determined except by further litigation. I am also satisfied that nothing is to be gained by having an alimony action proceeded with to have the present rights of the wife defined. She is quite prepared, if she is authorized to remain in possession of this house, to make no claim for maintenance. In view of her present financial position. I do not feel that she should receive any contribution from her husband in addition to the use and enjoyment of this property which, as stated, may be shared by the husband if he so desires. I would make the same disposition of the furniture on the premises.

There will, therefore, be judgment declaring

(a) that the plaintiff is not entitled to an order for possession of the premises or furniture in question in this action;

(b) that the plaintiff is not entitled to any allowance whatsoever for use and occupation by the defendant of the said premises;

(c) that the defendant is not entitled to payment of any sum whatsoever under the provisions of the separation agreement bearing date 1st September 1939.

While the defendant is not to be disturbed in her possession and enjoyment of the property in question in this action, the application of the husband is refused on condition that the defendant shall pay all municipal rates, taxes or assessments



to be levied on the said property, that she shall keep the same adequately insured, that she shall at her own expense make such repairs to the property as may be reasonable or necessary, and that she shall assert no claim for alimony as long as she occupies the property in question under the conditions now existing.

The defendant shall be entitled to recover from the plaintiff the costs of this action, including the costs of the issue directed by Mr. Justice Chevrier and of this trial.

*Judgment accordingly.*

*Solicitors for the plaintiff: Mirsky, Soloway, Assaly & Houston, Ottawa.*

*Solicitors for the defendant: Hill, Hill & Hall, Ottawa.*

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[COURT OF APPEAL.]

Re Barrett.

*Annuities — Right of Annuitant to Arrears — Annuity Payable out of Rents and Profits of Designated Property — Continuing Charge on Income — Right of Annuitant to Demand Accumulation of Surplus Income — Effect of Distribution of Surplus — Perpetuities.*

A testatrix, after giving her husband a life interest in her whole estate, gave and bequeathed annuities to her surviving daughters and a granddaughter, out of the rents and profits payable from a particular piece of land, this provision being followed by a residuary gift of all the rest of the testatrix's estate to all of her sons and daughters. For many years after the death of the testatrix's husband the income from the designated property was more than sufficient to pay the annuities, and surplus income was distributed under the residuary clause. After 1931, however, the income was insufficient for the annuities, and arrears accumulated.

*Held*, the annuities were cumulative, and if the rents and profits earned in any year were insufficient for payment in full the deficiency should be paid out of the rents and profits of other years. The annuitants had a continuing charge on the income from the designated property, and there was nothing in the will inconsistent with the annuitants' right to be paid their annuities in full in priority to the residuary beneficiaries, or indicating that the annuities were to be paid only out of the income for the year during which they were payable. *In re Coller's Deed Trusts; Coller v. Coller*, [1939] Ch. 277, applied.

The fact that the daughters of the testatrix had accepted distributions of surplus income, for the time being on hand, under the residuary clause, having in those years received their annuities in full, was at most a waiver of their right to have income accumulated to secure future instalments of the annuities, and did not prevent them from stopping distributions under the residuary clause when there was danger of the income being insufficient to meet the annuities in full. *Harbin v. Masterman*, [1896] 1 Ch. 351 at 361, quoted and applied.

The creation of a continuing charge on the income did not violate the rule against perpetuities, since the property in the rents and profits vested in the residuary beneficiaries, subject only to the husband's life interest and the payment of the annuities, on the death of the testatrix. What was called a continuing charge on income in this case, as was pointed out in *In re Collier's Deed Trusts, supra*, was merely a right to require surplus income to be accumulated within the limits permissible by law.

AN APPEAL by Naomi Beard and Unia Gaunt Barrett, two of the residuary beneficiaries of the estate of Rebecca Barrett, deceased, from the order of Judson J., [1953] O.W.N. 779. The same will was construed by the Court in *Re Rebecca Barrett* (1914), 5 O.W.N. 807, affirmed 6 O.W.N. 270.

7th and 8th October 1953. The appeal was heard by PICKUP C.J.O. and HOPE and J. K. MACKAY JJ.A.

*T. Sheard, Q.C.*, for the appellants: The effect of the testatrix's will, as providing for annuities payable out of the rents and profits of the King Street property, was decided by Middleton J. in *Re Rebecca Barrett* (1914), 5 O.W.N. 807, affirmed 6 O.W.N. 270. The testatrix's husband died in 1913, and for many years thereafter the rentals were more than sufficient to pay the annuities, and the surplus was distributed to the persons entitled under the residuary clause, including the daughters who also received annuities. During the depression after 1930 the revenues were insufficient to pay the annuities, and nothing was paid to the annuitants for some years.

The question now is whether the daughters, or the estates of deceased daughters, are entitled to a continuing charge on the income from the property for these arrears, or whether their annuities were payable only on an annual basis and to the extent only of the available revenues. Judson J. held that "at the very least these annuitants have a continuing charge on income". Our submissions are (1) as a matter of construction the testatrix clearly expected the annuities to be paid yearly, only so far as the rentals were available for the purpose, or, (2) alternatively, the annuitants, by acquiescing and sharing in the distribution of surplus income before the arrears commenced, concurred in the construction placed on the will by the appellants, and should not now be heard to take the opposite view, or (3) if, as Judson J. found, the will creates a continuing charge on income in favour of the annuitants, then it is void under the rule against perpetuities. I shall deal with these submissions in order.

1. If there is a gift of surplus income after a provision for an annuity, this gift will negative any continuing charge on income: *In re Collier's Deed Trusts*; *Collier v. Collier*, [1939] Ch. 277, [1937] 3 All E.R. 292. Judson J. erred in saying that there was no provision in the will for distribution of the surplus income, and also in saying that there was no difference between a charge on income and a charge on corpus. Unless there is a charge on corpus there cannot be a continuing charge on income. The will expressly provided that if the rentals from the property should increase the amount payable to the granddaughter should be increased over the annuity provided for her, and this constituted a direction for at least a partial distribution of surplus income.

Our submission is that the testatrix foresaw an annual distribution of the income, and did not intend to create a continuing charge. She never thought there would be any arrears. I refer to *Wormald v. Muzeen* (1881), 50 L.J. Ch. 776 at 777. She was thinking of a surplus of income, and the words "the annual sum" in the will point in the same direction, and negative any intention to create a continuing charge. The clause in the will reading "I give the same to each and every of my dear children, sons and daughters" would mean nothing while the annuitants lived if the surplus were charged for the benefit of the annuitants. [PICKUP C.J.O.: Were there other assets from which surplus income might accumulate?] Yes, some.

2. Even if, as a matter of construction, the Court holds that the annuitants are entitled to a continuing charge on the income, then we submit they have lost this right by their acquiescence in the distributions that have been made. These annual distributions, of which they accepted their shares, prevented the building-up of a reserve fund: *The Lindsay Petroleum Company v. Hurd et al.* (1874), L.R. 5 P.C. 221. The acquiescence in the present case amounted to a waiver of any charge. [PICKUP C.J.O.: Is it the fact that if the beneficiaries, including the annuitants, had not accepted the surplus from year to year, there would have been no arrears?] That is correct.

3. If there is a continuing charge, and the annuitants have not lost their rights, the continuing charge is an infringement of the rule against perpetuities. This point has never been expressly decided; it was raised in *Re Griffiths et al*; *Haworth v.*



*Welton*, [1945] 1 All E.R. 610, but the Court found it unnecessary to deal with it. I concede that an annuity charged on corpus does not offend the rule against perpetuities.

If a gift is not to offend against the rule, three conditions must be satisfied: (1) the beneficiary must be ascertained within the period; (2) the gift must take effect within the period; and (3) the property that is the subject-matter of the gift must necessarily come into existence within the period. The necessity for this last requirement was established by *Belyea et al. v. McBride et al.*, [1942] 3 D.L.R. 785, in the Privy Council. [PICKUP C.J.O.: Could not the surplus of rentals vest within the period, subject to a charge?] There cannot be a present gift of future property.

*J. W. F. Goodchild*, for the appellants: The payments are direct gifts; the will does not read "in trust to pay" or "subject to a payment". There is a difference in that respect from all the cases cited. The judgment of Judson J. is wrong, and this constitutes an annual gift to the annuitants, any surplus being given as a residuary gift to the children.

*J. L. Lewtas*, for the annuitants, respondents: I submit that Judson J. was right in holding that if in any year the rents and profits from the King Street property are insufficient to pay the annuities in full, the annuitants or their estates are entitled to have the arrears made up out of the rents and profits earned in later years, even after the death of the last annuitant. I rely on Theobald on Wills, 10th ed. 1947, p. 355; *In re Rose*; *Rose v. Rose* (1915), 85 L.J. Ch. 22 at 25; *Booth v. Coulton* (1870), L.R. 5 Ch. 684; *In re Collier's Deed Trusts*; *Collier v. Collier*, *supra*, at p. 282. The will cannot be understood as limiting the annuities to the rents and profits of each year. The only clear intention shown by the will is one to benefit the testatrix's daughters more than some of the other beneficiaries.

The vesting of the King Street property in the residuary beneficiaries, referred to in the 1914 judgment of Middleton J., *supra*, is a vesting "subject to these annuities", and indicates only that the residuary beneficiaries have a present vested interest in everything to which the annuitants are not entitled. That vesting cannot affect the rights conferred on the annuitants by the will: *Stelfox v. Sugden* (1859), John. 234, 70 E.R. 410; *In re Collier's Deed Trusts*, *supra*; *Re Carey*; *Wardle et al. v.*

*Carey et al.*, [1950] 1 All E.R. 726. In these three cases there was specific direction for distribution of surplus income, but that is not the case here. The provision for increasing the amount payable to the granddaughter was merely an increase in her annuity, not a disposition of the surplus, or any part of the surplus. Middleton J. pointed out in his judgment that the amounts mentioned in the will accounted for virtually the whole of the revenue at the time the will was made. Even if the testatrix was, as submitted by the appellants, thinking of surplus income, this is not of great significance, since what we are concerned with here is a deficiency of income. Either there was no intention on her part to provide for distribution of the surplus, or that intention, if she had it, was not sufficiently expressed to be effective.

There was no acquiescence by the annuitants. When they received extra benefits out of surplus there were no arrears of annuities owing. [PICKUP C.J.O.: This deficiency would never have occurred if the surplus had not been distributed to persons including the annuitants. Why should they get more now to make up the previous deficiency?] The residuary beneficiaries have received all the benefits they are entitled to. The fact that the annuitants are also residuary beneficiaries should not be taken against them. The failure to accumulate the surplus income prejudiced the annuitants, and should not bar their present claim.

The rule against perpetuities does not apply to vested interests, and if an interest vests within the period the rule does not affect its duration. The annuities and the accompanying charge on income vested during the lives of the daughters of the testatrix, which were lives in being at the time of her death, and therefore the duration of that interest does not matter. There is a gift of an annuity which constitutes a portion of the rents, and this is a present gift: Gray, *The Rule against Perpetuities*, 4th ed. 1942, p. 260; *In re Allott; Hammer v. Allott*, [1924] 2 Ch. 498. *Belyea et al. v. McBride et al.*, *supra*, is not applicable to this case, where there is a present gift of annuities which vest immediately.

It appears to be the rule, on the authorities, that a continuing charge on income is equivalent to a charge on corpus: *Re Griffiths et al.*, [1945] 1 All E.R. 610 at 611-2. The test is

whether a Court of equity would order a sale or mortgage of the property in order to enforce a continuing charge on income: *In re Young; Brown v. Hodgson*, [1912] 2 Ch. 479 at 486; *Hambro v. Hambro*, [1894] 2 Ch. 564 at 567; *Phillips v. Gutteridge* (1859), 4 DeG. & J. 531, 45 E.R. 206. *Re Goodwin* (1919), 17 O.W.N. 198, seems to be contrary to this position, but does not deal with the same type of case as this one. There was in that case no continuing charge, and therefore nothing equivalent to a charge on corpus. *Foster v. Smith* (1845), 1 Ph. 629, 41 E.R. 772, is the same type of case as *Re Goodwin*.

*J. T. Weir*, for the trustee, submitted his client's rights to the Court.

*T. Sheard, Q.C.*, in reply: If the testatrix has created a continuing charge on income, that charge may render the property inalienable for a very long time. If the annuities had been larger the property might have been tied up indefinitely. A provision that could produce such a result must be invalid: *Jarman on Wills*, 8th ed. 1951, p. 284.

*Cur. adv. vult.*

23rd October 1953. The judgment of the Court was delivered by

PICKUP C.J.O.:—This is an appeal from the judgment of Judson J. pronounced in Weekly Court at Toronto on 19th June 1953, on an application made to him by the trustee of the estate for the advice and direction of the Court with respect to certain matters arising in the administration of the trusts created by the last will and testament of Rebecca Barrett deceased.

The late Rebecca Barrett died on or about 3rd August 1893, and at the time of her death she was the owner of real estate situate on the south-west corner of King and Victoria Streets, in the city of Toronto, which I shall refer to as "the King Street property". Her will is dated 31st May 1888. By this will the testatrix gave to her husband a life interest in her whole estate. She then gave and bequeathed *out of the rents and profits payable from* the King Street property an annual sum of money to be divided among her surviving daughters and a granddaughter, Edith Emily. The division of a stated amount of income was to be made equally among the four surviving daughters, a different amount being payable to the grand-



daughter, but provision was made for increase in the amount payable to the granddaughter, so as to make her annuity equal to the daughters' annuities, in the event of the rents being increased when the lease existing at the time of the making of the will should come to an end. It was decided by Middleton J. (as he then was) when this will was before him for construction in 1914 (*Re Rebecca Barrett*, 5 O.W.N. 807, affirmed 6 O.W.N. 270), that these annuities to the daughters were for the life of each daughter, and that on the death of any daughter leaving issue her children would take the annuity for life, and that on the death of any daughter leaving no children the surviving daughters of the testatrix and their children would take the annuity for life.

The provision in the will for payment of these annuities was followed by a residuary gift of all the rest of the real and personal estate of the testatrix to all of her sons and daughters, to be equally enjoyed by them during the terms of their natural lives, and after their deaths to their heirs and assigns forever.

The husband of the testatrix died in 1913, and for many years thereafter the net rentals from the King Street property were more than sufficient to take care of the annuities payable to the daughters and the granddaughter, but the granddaughter died in September 1915.

During the period from 1913 down to and including the year 1931 surplus income from the King Street property, after payment of the annuities, was distributed under the residuary clause in the will, the daughters entitled to such annuities receiving, in addition thereto, their respective shares of such surplus income as residuary beneficiaries. For some years after 1931 the rentals from the King Street property were insufficient to pay the annuities in full, and a substantial amount of arrears accumulated. In January 1946 Sarah Frances Barrett, one of the daughters, died without issue, leaving the three surviving daughters of the testatrix to share the division of the moneys directed to be divided among the daughters. In November 1947 Helena Augusta Mossom, another daughter, died, but leaving children, who succeeded to her share in the annuity moneys. In July 1951 Ada Pauline Barrett, a third daughter, died without issue. Since 1951 one daughter alone survives, along with three children of the deceased daughter, Helena Augusta Mossom, so that the income available for payment of the annuities has

been divided one-half thereof to the sole surviving daughter and the remaining one-half thereof among the three granddaughters.

The learned judge in Weekly Court held that the annuities payable to the daughters out of the rents and profits of the King Street property were cumulative and declared that if the rents and profits earned in any year from that property were insufficient to enable payment in full of the annual amount payable in respect of that year, the deficiency should be paid out of the rents and profits of any other year or years. From this judgment counsel for residuary beneficiaries appeal to this Court, contending that the annuities are not cumulative, but that under the true construction of the will the net rents and profits in each year should be distributed annually, so that after the annuitants have received payment of their annuities in any year the surplus income in that year should be distributed under the residuary clause in the will and not applied to make up any deficiency in payment of annuities in past years.

The principles of law applicable were considered by the Court of Appeal in England in *In re Collier's Deed Trusts; Collier v. Collier*, [1939] Ch. 277, [1937] 3 All E.R. 292. In that case the Court was dealing with trusts contained in a will under which the trustees were to hold the testatrix's estate and income upon certain trusts, first, to make certain weekly payments out of the income and to pay or apply the whole or any part of the balance of the income for the maintenance, support or benefit of certain persons during the widowhood of the widow of the testator, and subject to that to apply the balance of the income in payment off of existing mortgages on the testator's real estate or some part thereof. It was pointed out by Romer L.J. in that case that where there is in a will a bequest of an annuity, the residuary legatees or the other persons becoming entitled to the testator's residuary estate can take that estate only on the terms of paying or providing for the payment of the annuity in full, and that the annuity is a charge upon the whole income and corpus of the residuary estate just as much as if it were an ordinary pecuniary legacy. The learned lord justice went on to point out that where the trust is one to pay an annuity out of the income of a trust fund, it is often a question of considerable doubt whether the arrears of the annuity in one year can

be paid out of the income of a subsequent year. He said at p. 281:

“The language of the instrument may, indeed, make it quite clear that the instalment of the annuity for one year is only to be paid out of the income for that year. But even when the actual trust for the payment of the annuity, if standing by itself, would be so construed, the subsequent language may show that the arrears in any year are to be raised out of the corpus of the trust fund. Such will be the case if the corpus be given not merely ‘subject to the trust for payment of the annuity’ but ‘subject to the payment of the annuity.’ For these, or words to the same effect, indicate that the corpus is only to be taken on the terms that the annuity is paid in full, and the trust to pay the annuity out of the income for each year is regarded as being directory only and not as limiting the rights of the annuitant. But now take the case of a trust to pay an annuity out of the income of a trust fund without any subsequent indication being given that the annuity is in any case to be paid in full, and without any express words confining the annuity for any one year to the income of that year. Under such a trust the annuity is *prima facie* a continuing charge upon the income of the fund, and the annuitant, or his legal personal representatives after his death, will be entitled to have the income impounded until all arrears of the annuity are paid. Sometimes, indeed, this right only extends to the income arising during a limited period such as, for instance, the annuitant’s life. This is the case when a trust is expressed to take effect at the expiration of that period in terms that show that the whole trust fund both capital and future income is, at that moment, to go over to another person intact. But in the absence of any such indication, the right to have the income applied in satisfaction of the arrears will continue until the arrears are satisfied. But what is to happen to the surplus remaining in any year after the annuity and all arrears up to that time have been satisfied? I cannot think that the answer to this question admits of any doubt. Where any property is charged with or is subject to a trust for payment of an annuity the annuitant is entitled to demand and can, by taking the appropriate steps, ensure that every part of that property is made available for payment of the annuity, and the right of the annuitant must prevail whatever may be the nature of the property that is



charged or is the subject-matter of the trust. Where, therefore, the property in question is the income of a fund, the annuitant is in strictness entitled to require that the surplus income in any year, after keeping down the current instalments of the annuity and any existing arrears, shall, within the limits permissible by law, be accumulated for the purpose of meeting subsequent instalments. If this be the right, as I think it is, of an annuitant whose annuity is a continuing charge upon the income of a fund until paid in full, any directions in the instrument creating the annuity that are inconsistent with that right indicate that the annuity is not meant to be so charged."

I am of the opinion that nothing in the will of Rebecca Barrett indicates that the annuities to be paid to the daughters or their issue are to be paid only out of the income for the year during which the annuity is payable. There is, in my opinion, no provision in the will inconsistent with the annuitants' right to be paid their annuities in full in priority to residuary beneficiaries receiving any benefit under the residuary provision in the will.

Counsel for the appellants contend that the provision in the will providing for an increase in the amount payable to the granddaughter, Edith Emily, in the event of the rents from the King Street property being increased, is a disposition of surplus income after payment of the annuities to the daughters and is, therefore, inconsistent with an intention on the part of the testatrix that the daughters should receive the amount of any deficiency of annuity in one year out of surplus rentals in a later year, but I do not think that is the effect of the provision in favour of this granddaughter. It is not, in my opinion, a disposition of surplus income remaining after payment of the annuities, but merely a provision increasing the amount of one of the annuities. I find nothing in this will inconsistent with the right of an annuitant to require surplus income in any year, after keeping down the current instalments of the annuities and any existing arrears, to be accumulated, within the limits permissible by law, for the purpose of meeting subsequent instalments. The residuary provision, either by itself or along with the earlier provisions in the will, cannot, in my opinion, be construed to have such effect.

It is argued by counsel for the appellants that the judgment of Middleton J. above referred to, which judgment was affirmed

in the Court of Appeal, is consistent only with an annual distribution of the income from this property. In that case the Court was dealing with the question whether or not the gift of income involved in the gift of these annuities was a gift of the whole of the rents from the real property in question, and therefore a gift of the property itself in fee tail. The Court held that it was not but that it was merely a gift out of the rents of the exact amount of the rents. Middleton J. in his judgment said that the increased rental above the amounts payable to the daughters and the granddaughter would pass to all of the children, sons and daughters, under the residuary clause, but in making that remark I think the learned judge was referring to increased rental remaining after the annuities were fully paid or provided for. I do not think that he meant that the residuary benefits were not subject to payment in full of the annuities.

I am therefore of the opinion that under the terms of this will the annuitants were entitled to be paid their annuities in full before the residuary beneficiaries were entitled to take any benefit under the residuary clause in the will. It follows that the annuitants were entitled to have surplus income arising in any year from the King Street property accumulated to be available for payment of any deficiency which might occur in a later year.

Counsel for the appellants contend further, however, that even if these annuitants were, under the true interpretation of the will, entitled to have the deficiency in any year made good out of surplus income in another year, the deficiency now existing should not be made good out of future rentals because the annuitants in the years which have passed have accepted their respective shares under the residuary clause in the will, and if there had been no distribution of surplus income among the residuary beneficiaries, the income from the King Street property would have been sufficient to pay the annuities in full. This is conceded to be the fact.

Looking at the position of the surviving daughter, one of the respondents, it will be seen from the accounts that she received in the years 1924 to 1931 inclusive, out of surplus income from the King Street property, an amount in excess of the present deficiency in her annuity, but she received such moneys in distributions from residue, having, at the time of such distributions,

received all instalments of her annuity which were due and payable.

The position of the respondent granddaughters is the same, except that it was their mother who received the moneys distributed out of residue and not the granddaughters.

Counsel for the appellants contend that by participating in this distribution the annuitants have acquiesced in the annual distribution of surplus income under the residuary clause, and have thereby lost their right to have future surplus income applied to make good arrears now accumulated. I do not think that argument can prevail. I think that the most the daughters can be said to have done is to have waived their right to have income, for the time being on hand, accumulated to secure payment of future instalments of the annuities. That would not, in my opinion, prevent them from stopping the distributions under the residuary clause when there appeared to be danger of the income being insufficient to meet the annuities in full.

The result of not giving effect to this contention of the appellants is that the residuary beneficiaries will ultimately receive the same total amount, but a parent will have received moneys which her successor in interest would have received if the surplus income had been accumulated within the period permissible by law. The same result might have been accomplished by making distributions of residue, with the approval of the Court, when there were the large amounts of surplus in each year.

Lindley L.J. in *Harbin v. Masterman*, [1896] 1 Ch. 351, said at p. 361: "Counsel's point was that the payment in respect of the annuity will not come to an end until Mrs. Venable's death, and that upon the terms of the will there is no jurisdiction in the Court to order the residuary estate to be distributed until after her death. Now, according to the strict language of the will, that no doubt is so. But what is the meaning of a will which charges a residuary estate with a legacy or several legacies of this kind, and directs that upon the death of the survivor of the annuitants the residue is to be divided? As between the annuitants on the one hand and the residuary legatees on the other, it is a gift of the residue subject to the payment of the annuities. And if the annuities are released or ample provision is made for the payment of them, it has been the invariable



practice of the Court to let the residuary legatees have what is theirs, subject to the payment of the annuities."

It may be that the effect of applying future surpluses of income against past deficits will be that the annuities will be paid in full without any injustice being done to anyone. I would, therefore, not give effect to the contention of the appellants that by acquiescence in distributions of residue the annuitants lost their rights as given to them by the will.

There remains the contention of the appellants that if, by the terms of this will, the testatrix created a continuing charge on income, the effect thereof would be to render the property inalienable for such a period of time as would offend the rule against perpetuities. The basis of this argument seems to be that the time when any deficiency in any year will be made good out of future surplus income is uncertain and might tie up the property indefinitely, meaning thereby property in the rentals from the King Street property. I think an answer to this argument is that the property in this income vested and under the terms of the will must vest within the period prescribed by the rule against perpetuities. Such part of the income as passes under the residuary clause was vested in the residuary beneficiaries on the death of the testatrix, subject only to the life estate of the husband of the testatrix and the payment of the annuities. I think this contention of the appellants does not give effect to the true nature of a continuing charge on income, such as exists in this case. What is called a continuing charge on income in this case is the right, as stated by Romer L.J. in *In re Coller's Deed Trusts, supra*, to require surplus income to be accumulated within the limits permissible by law. I do not think the creation of such a right offends the rule against perpetuities.

I would, therefore, dismiss the appeal and direct that the costs of all parties appearing on the appeal be paid out of the estate, the costs of the trustee being taxed as between solicitor and client.

*Appeal dismissed.*

*Solicitors for the trustee: Mason, Foulds, Arnup, Walter & Weir, Toronto.*

*Solicitors for the residuary beneficiaries, appellants: Mackenzie, Saunderson, Wood & Goodchild, Toronto.*

*Solicitors for other beneficiaries, respondents: Arnoldi, Parry & Campbell, Toronto.*

[McRUER C.J.H.C.]

**Re McIntyre.**

*Companies — Distribution of Accumulated Surplus in Form of Stock Dividend — Effect — Whether Company's Intention to Increase Capitalization—Whether Shares, or Proceeds, Income or Capital in Hands of Trustee-shareholder — The Companies Act, R.S.O. 1950, c. 59, ss. 78, 80, 96 — The Income Tax Act, 1948 (Can.), c. 52, s. 95A(1), as enacted by 1950, c. 40, s. 32.*

A company incorporated under the Ontario Companies Act, having on hand a large undistributed surplus, obtained supplementary letters patent which increased the capital stock of the company from \$500,000 to \$1,000,000 by the creation of \$500,000 in preference shares ranking in priority to the common shares. It then proceeded to issue the preference shares to its shareholders *pro rata*, and to redeem them, thus wiping out the surplus. The trustee of an estate, being the holder of shares in the company, participated in this distribution and received cash on the redemption of the preference shares.

*Held*, in the circumstances, and on a consideration of the company's corporate acts (as distinguished from declarations of the intention of the directors, which did not affect the capital structure), the moneys in the hands of the trustee constituted, as between the life tenants and the remaindermen, corpus of the estate rather than income. *Re Fleck*, [1952] O.R. 113, affirmed [1952] O.W.N. 260; *Re Mills*, [1953] O.R. 197, held inapplicable; other authorities reviewed.

The provisions of The Income Tax Act cannot affect rights in respect of shares in a company incorporated under the laws of a Province. The character, as a matter of law, of any given distribution as it leaves a company determines its character in the hands of the recipient. *In re Duff's Settlements*; *National Provincial Bank Ltd. v. Gregson et al.*, [1951] Ch. 923; *Hill et al. v. Permanent Trustee Company of New South Wales, Limited et al.*, [1930] A.C. 720, applied.

A MOTION by the executor and trustee of the estate of Henry James McIntyre, deceased, for the opinion, advice and direction of the Court as to moneys received by the trustee as the holder of shares in The Hamilton Jockey Club (Limited).

27th April 1953. The motion was heard by McRUER C.J.H.C. in Weekly Court at Toronto.

A. L. Ambrose, Q.C., for the executor and trustee, applicant.

D. J. Dore, for the life tenants.

F. T. Watson, Q.C., for the Official Guardian, representing infant remaindermen and unborn issue.

27th October 1953. McRUER C.J.H.C.:—This is an application by the executor and trustee of the estate of the late Henry James McIntyre for advice. Three questions are propounded for the opinion of the Court. They are as follows:

"1. Whether upon the true construction of the said Will and in the events which have happened, the sum of \$13,575

being the sum received by the Trustee upon the redemption of 13,575 non-cumulative 5% redeemable Preference Shares of The Hamilton Jockey Club (Limited) which were issued as a stock dividend by the said Company to the Trustee on the 9th. day of April, 1951, is corpus or income in the hands of the Trustee for the purpose of administering the said Estate.

"2. Whether upon the true construction of the said Will and in the events which have happened, the sum of \$3,000. being the sum received by the Trustee upon the redemption of 3,000 non-cumulative 5% Redeemable Preference Shares of The Hamilton Jockey Club (Limited) which were issued as a stock dividend by the said Company to the Trustee on the 25th. day of October, 1951, is corpus or income in the hands of the Trustee for the purpose of administering the said Estate.

"3. Whether upon the true construction of the said Will and in the events which have happened, the sum of \$26,250 being the sum received by the Trustee upon the redemption of 26,250 non-cumulative 5% Redeemable Preference Shares of The Hamilton Jockey Club (Limited) which were issued as a stock dividend by the said Company to the Trustee on the 26th. day of October, 1951, is corpus or income in the hands of the Trustee for the purpose of administering the said Estate."

The Hamilton Jockey Club (Limited) was incorporated under the Ontario Companies Act in the year 1893. On the 9th March 1936 the authorized capital was \$500,000, divided into 5,000 shares of a par value of \$100 each, of which 4,850 shares were issued at that date. The fiscal year of the Club ended on the 31st October in each year and the balance at the credit of the profit and loss account on the 31st October 1935, was \$9,696.98. On the 31st October 1939 this had been increased to \$61,236.54.

On the 1st December 1947, pursuant to the provisions of The Income War Tax Act, R.S.C. 1927, c. 97, as amended, the directors of the Club elected to pay a tax of \$9,185.46 on the aforementioned balance and declare a dividend of \$52,051.08 for division *pro rata* among the shareholders of the Club. This dividend was paid on the 20th December 1947.

In the month of February 1948 the company sold "The Jockey Club Hotel" for \$250,000, realizing a profit on the sale of \$169,900.38. This amount was carried into the balance sheet



of the company as a liability and shown "Capital Surplus (Re Sale of Hotel) \$169,900.38".

On the 30th October 1950 the directors of the company by by-law authorized an application to the Lieutenant-Governor of Ontario for supplementary letters patent for the increase of the capital of the company by the creation of 500,000 5% non-cumulative redeemable preference shares of a par value of \$1 each ranking in priority to the common shares of the company. The by-law was ratified and confirmed by the shareholders on the 4th December 1950. In accordance with the application supplementary letters patent were issued on the 9th February 1951, and certificates for the preference shares which were ultimately issued were in the form set out in the material. The respective rights of the common and preference shares as endorsed on the back of the certificate included the following paragraphs:

"(4) In the event of the winding up or the dissolution of the Company the preference shares shall, in preference and priority to any payment on the common shares, be entitled, out of the assets of the Company available for distribution to shareholders, to the payment in full at par of the amount paid up on the preference shares, together with the amount of all dividends declared thereon and unpaid, but shall not be entitled to any further participation in any assets;

"(5) The directors may at any time and from time to time redeem the whole or any portion of the preference shares by compulsory redemption at a price per share equal to the amount paid up thereon, together with the amount of all dividends declared thereon and unpaid; in the event that less than all the outstanding preference shares are being redeemed, the shares to be redeemed shall be selected pro rata . . . "

At a meeting of the directors of the company held on the 2nd April 1951 a resolution was passed which recited that the Club had "tax free undistributed earned income" as of 31st October 1949, and that redeemable non-cumulative preference shares of a par value of \$1 each had been created, and continued:

"And Whereas it is desirable to declare a *stock dividend* to exhaust the balance of the capitalized earned surplus of the Club after deducting the 15% tax payable to the Federal Government.

"A *stock dividend* of shares of the preferred stock of the Club of the par value of \$1.00 each representing \$18.10 per

common share be declared and paid as of the 9th day of April, A.D. 1951 and that such shares of the Preferred Stock of this Club be issued and distributed as *a stock dividend* to the holders of Common shares of the Club pro rata in accordance with their respective holdings of record on the books of the Club at the close of business on the 7th day of April, A.D. 1951. Provided, however, that no fractional share of preferred stock shall be issued" (The italics are mine.)

At the same meeting a resolution was passed that the Club redeem all the issued and outstanding fully-paid preference shares at their face value as of the 9th April 1951, and in accordance with the terms of redemption of the said preference shares.

On the 11th October 1951 the company's auditors made a report to the directors, the opening paragraph of which reads as follows:

"We have been asked by Mr. J. J. Conway, your Managing Director, to report to you on the possibilities which exist of making a distribution to the shareholders of your Company of the Capital Surplus now standing on the books of the Company at \$172,551.07."

The report proceeds to outline the steps required to be taken at the least cost to the company and its shareholders to effect the distribution, and points out that: "The principal point to bear in mind is that in order to place a Capital Surplus in the hands of the shareholders of a Company tax free, the Earned Surplus Account of the Company must either have a nil or a debit balance, since if there is any undistributed Earned Surplus on hand at the time a Company proposes a distribution of Capital Surplus then in the view of the Tax Department, the Earned Surplus is distributed first, and only the amount by which the distribution exceeds the Earned Surplus is deemed Capital Surplus."

The report estimates that the balance of the earned surplus available for distribution at the end of the fiscal year of 1951 would be \$63,919.83 and states that this balance must be vacated before any tax-free distribution of capital surplus can be made to the shareholders. In the computation a proposed annual dividend of \$24,250 was deducted, a sum of \$3,638 being a payment of 15 per cent. tax on an amount equal to the dividend paid

in the fiscal year ending in 1950, and a transfer to tax-free surplus of \$20,612, leaving a balance of \$15,419.83 which would require to be paid to the shareholders as a cash dividend if the earned surplus account was to be cleared.

The payment of the 15 per cent. tax and the transfer to tax-free surplus were made because the company had elected, under the provisions of s. 95A(1) of The Income Tax Act, 1948 (Can.), c. 52, as enacted by 1950, c. 40, s. 32, to pay tax on its undistributed surplus at the end of the 1949 fiscal year.

The report and seven schedules attached to it show the steps to be taken by the company:

Schedule "A" outlines the amount required for the payment of the annual dividend, the proposed payment of 15 per cent. tax and the proposed transfer to the tax-free surplus, and shows a balance required to be distributed as a special dividend of \$15,419.93, so as to reduce the earned surplus to nil.

Schedule "G" is entitled "Capital Surplus Adjusted for the Purpose of Distribution to Shareholders" and shows a balance of \$172,551.07.

Schedule "B" is entitled: "Proposed Distribution of Capital Surplus". The auditors' statement is:

"Provided that the steps outlined in Schedule 'A' have been taken before 31st October, 1951, the Capital Surplus of \$172,551.07 may be distributed to the shareholders by way of *a cash or a stock* dividend, which will be tax-free if made before 31st October, 1951. If made on or after 1st November, 1951, the shareholders will be taxable to the extent that profits are earned in the year ended 31st October, 1952." (The italics are mine.)

Schedule "F" sets out the adjustments of the earned surplus account for the purpose of distribution of capital surplus.

The minutes of the company record that on the 24th October 1951 the board of directors had placed before it the report of the company's auditors "which dealt with a method of distributing to the shareholders the capital surplus on the books of the Club in the sum of \$172,041.07 [*sic*]".

By resolution of the board of directors the auditors' report was made part of the minutes of the meeting, and it was resolved that the method of procedure outlined in the auditors' report be followed. The company elected to pay, in accordance



with s. 95A of The Income Tax Act, a 15 per cent. tax on its undistributed income of \$24,250. A *stock dividend* of 19,400 shares of preference stock of the company of a par value of \$1 per share was declared and a resolution provided that the shares "be issued and distributed as a *stock dividend* to the holders of common shares" *pro rata* in accordance with their respective holdings at the close of business on the 24th October 1951.

A further resolution provided that: "A proper notice of redemption of 19,400 shares of the preference stock of the Club be sent to all Shareholders of record as of the close of business on the 24th day of October, 1951."

A cash dividend of \$7.50 per share was declared on the outstanding common shares of the company as of that date.

A final resolution reads as follows:

"A *stock dividend* of 169,750 shares of preference stock of this Club of the par value of \$1.00 per share be and the same is hereby declared and that the said 169,750 shares of preference stock of this Club be issued and distributed as a *stock dividend* to the holders of common shares of this Club, *pro rata*, in accordance with their respective holdings of common stock of record on the books of this Club at the close of business on the 25th day of October, 1951." (The italics are mine.)

It is to be noted that there is nothing in the minutes of this meeting that gives any indication as to when or how these shares might be redeemed.

Prior to the 27th May 1952 negotiations were carried on with the directors of the company which culminated in the purchase by The Ontario Jockey Club Limited of all the issued and outstanding common shares of the company at a price of \$275 per share.

The minutes of a meeting of the directors held on the 27th May 1952 show that: "The Chairman advised the Board of the informal discussions held with respect to the issued and outstanding preference shares." The secretary put before the board a statement showing the requirements of the Club with respect to the cash projection to the end of the second race-meeting for the year. The minutes show that this statement had been submitted to the manager of the Canadian Bank of Commerce and that the manager had advised that he would

authorize credit on the company's note in the amount of \$175,000 for the redemption of the preferred shares, and a further credit in the sum of \$150,000 to \$200,000 for requirements of the race-meeting on an open account. The minute goes on to state: "It was felt that the Executive Committee could determine the method of financing both redemption of the preferred shares and the two race meets."

This was followed by the following minute: "It was moved by Mr. Sherman and seconded by Mr. R. P. Isbister and Resolved that the 169,750 Redeemable Preference Shares of the Club be redeemed as of the 27th of May, 1952, and that proper notice of the redemption of the said shares be sent to all Shareholders of record on the books of the Club at the close of business on the 27th of May, 1952."

The notice was sent out accordingly, and the shares were redeemed.

Pursuant to the resolutions passed at the respective directors' meetings, on the 20th December 1947 the trustee received from the company a tax-free dividend of \$8,049.08, which was paid out of the undistributed income of the company on hand at the 31st October 1939. On the 9th April 1951 the trustee received from the company certificates in the form I have mentioned for 13,575 non-cumulative 5% preference shares of a par value of \$1 each as a stock dividend, which shares were immediately surrendered for redemption at \$1 per share. The notice from the company accompanying the stock dividend recites the by-law passed on the 4th December 1950 providing for the stock dividend and the motion made to redeem the stock forthwith. The notice reads in part as follows:

"NOTICE is hereby given that The Hamilton Jockey Club (Limited) (hereinafter called 'the Club') will on and after Monday the 9th day of April, A.D. 1951, redeem the whole of the presently outstanding 5% Non-Cumulative Preference Shares of the par value of \$1.00 each *in the Capital Stock of the Club* (hereinafter called the 'Preference Shares') by payment to the holders thereof at their face value of \$1.00 per share." (The italics are mine.)

The shares were immediately surrendered for redemption and the trustee received \$13,575.

On the 27th October 1951, the trustee received from the company a letter addressed to the shareholders of the company

dated 25th October 1951, enclosing certificates for 3,000 non-cumulative 5% preference shares of a par value of \$1 each as a stock dividend. A notice accompanying an enclosed cheque, a preferred share certificate and notice of redemption reads in part as follows:

"Your Directors have been endeavouring to place in the hands of the Shareholders, free from personal income tax, a capital surplus which has been chiefly derived from the capital gain obtained at the time of the sale of the Jockey Club Hotel. To do this it is necessary to wipe out entirely the earned surplus.

"To that end your Directors have elected to pay a 15% tax to the Government and to declare a preferred stock dividend of the value of \$4.00 for each common share held by you, which is non-taxable income to you."

In addition to the stock dividend, a dividend of \$7.50 per share on the common stock was paid at the same time. The accompanying letter states:

"This represents the usual dividend of \$5.00 per share plus \$2.50 per share which latter amount was sufficient to wipe out the balance of the earned surplus. This dividend represented by the enclosed cheque is taxable income to you.

"Shortly you will be advised of your Directors' actions in placing in your hands the capital surplus of the Club by way of a further preferred stock dividend."

Attached to the letter to shareholders was a notice of redemption of the preferred shares which read as follows:

"Notice is hereby given that The Hamilton Jockey Club (Limited) (hereinafter called 'the Club') will on the 24th day of October, 1951, redeem the whole of the outstanding 5% Non-cumulative Redeemable Preferred Shares of the par value of \$1.00 each in the *capital stock* of the Club (hereinafter called the 'Preferred Shares') of date of issue the 24th day of October, 1951, by payment to the holders thereof the par value thereof.

"The Club will pay the redemption price to or to the order of the registered holders of the said Preferred Shares on presentation and surrender of the certificates for such shares at the office of the Club, 21 Main Street East, Hamilton, Ontario.

"And notice is also given that from and after the 24th day of October, 1951, the said Preference Shares shall cease to be



entitled to dividends and the holders thereof shall not be entitled to any rights in respect thereof except that of receiving the redemption price.

"Dated at Hamilton, Ontario, this 24th day of October, 1951." (The italics are mine.)

On the 27th October 1951 the trustee received from the company 26,250 non-cumulative 5% preference shares of a par value of \$1 each. The notice from the company accompanying this stock dividend reads in part as follows:

"You were advised in our letter of the 25th instant that the earned surplus had been wiped out and as a consequence the capital surplus could be distributed to you. This can only be done by way of issuance of preference shares.

"Accordingly your Directors have declared a *stock dividend* and the enclosed preference share certificate represents your share of the distribution among the Shareholders of the capital surplus.

"Your Directors do not intend, at the present time, to redeem this certificate but upon redemption at some future time it is our best present advice that the proceeds therefrom will not be taxable income to you." (The italics are mine.)

On the 27th May 1952 the trustee received a notice of redemption of the 26,250 preference shares. The notice states that the redemption price will be paid to or to the order of the registered holders of the preferred shares on presentation and surrender of the certificates for such shares. It goes on to state:

"Shareholders were informed under the dates of 25th and 26th October last, that the above Preferred Shares, now called for redemption, represented a distribution of the Club's Capital Surplus and that the proceeds therefrom are not, we understand, taxable income to the Shareholders."

I prefer to deal first with the last distribution of shares as the facts surrounding it differ distinctly from those surrounding the distribution and redemption of the first two issues in the following important respects:

(1) The fund which provided the capital warranting the issue of the shares was, up until the time of the issue, treated by the company as a capital surplus. (I do not think this is a

material fact, but it is a fact that has been the subject of much discussion in some of the cases to which I shall refer.)

(2) The fund had been so absorbed into the capital assets of the company that there were no funds with which to redeem the shares without pledging the general credit of the company.

(3) Certificates for the shares were issued on the 25th October 1951 under the seal of the company, and from that date the holders of the shares had all the rights of preferred shareholders and the obligations relative to those rights were imposed on all the assets of the company.

(4) The shares were not redeemed until the 27th May 1952.

(5) The redemption of the shares at any future date was dependent on the credit of the company or the liquidation of its assets.

(6) The company's credit affecting its powers or desire to borrow money from the bank might have been affected between the time the shares were issued and redeemed in many ways; for instance, legislative action affecting horse-racing and betting on race-tracks similar to Order in Council 1452 of 7th June 1917, which repealed for the duration of the war and six months thereafter s. 235(2) of The Criminal Code, thereby making all betting at race-courses illegal; or an emergency appeal such as was issued in the United States of America by James F. Byrnes on 3rd January 1945, with instructions to prevent the use of manpower or materials for the purpose of horse-racing; or heavy taxes such as were imposed by The Corporations Tax Act, 1920 (Ont.), c. 9; or an increase in the present licence-fee and tax of 8 per cent. imposed on bets placed at a race-track; or action taken by the proper legislative authority, such as was considered in *Re Race-Tracks and Betting* (1921), 49 O.L.R. 339, 61 D.L.R. 504, 36 C.C.C. 357; or if the company had been a commercial or investment company it might have suffered severe loss through fire, unpredicted competition or reverses in the stock-market.

(7) Before the shares were redeemed the company was negotiating for the sale of all its assets.

Counsel for the life tenants argued that the decisions in *Re Fleck*, [1952] O.R. 113, [1952] 2 D.L.R. 657, [1952] C.T.C. 196, affirmed [1952] O.W.N. 260, [1952] 2 D.L.R. at 664, [1952] C.T.C. 205, and *Re Mills*, [1953] O.R. 197, [1953] 2 D.L.R. 80,

[1953] C.T.C. 115, applied to this case and that without further consideration the matter should be disposed of in favour of the life tenants. In both of those cases the shares in question were shares in a company incorporated under the Dominion Companies Act and for reasons which I shall give in due course the provisions of the Dominion Companies Act so differ from the Ontario Companies Act that it makes it necessary for me to consider this case solely in the light of the rights of the parties with respect to shares in a corporation that exists under the Act authorizing its corporation. I find that I must therefore review in some detail many of the decided cases that bear on the subject.

These cases may best be considered in their chronological order. In so far as there may be any apparent conflict, I must regard the decisions in the Judicial Committee of the Privy Council as binding, at the same time following any interpretation of those decisions by our own Courts, where questions of law are involved.

Three cases form the background of the discussion in later cases: *Irving et al. v. Houstoun* (1803), 4 Pat. App. 521; *Paris v. Paris* (1804), 10 Ves. 185, 32 E.R. 815; *In re Ezekiel Barton's Trust* (1868), L.R. 5 Eq. 238.

In *Irving et al. v. Houstoun*, *supra*, it was directed by a testamentary deed that the widow of the deceased should have a life interest in 144 shares held in the Bank of Scotland stock "to receive the dividends when due, or becoming due thereon". Recently before his death the testator had subscribed for a certain number of these shares and at his death a considerable part of the subscriptions, which were payable by instalments, was unpaid. The Bank of Scotland declared a bonus or extraordinary dividend arising from accumulated capital and not as an ordinary dividend arising from profits. The bank detained this bonus to answer the instalments not then paid up on the stock which had been subscribed for, but Lord Eldon stated that the question remained the same between the life tenant and the remainderman as if the calls or instalments had been regularly paid up when they became due. In the Court below it was held that the life tenant was entitled to the whole sum as a dividend falling due on the bank stock of her deceased husband. The House of Lords reversed the decision, holding that the bonus dividend belonged to the capital of the estate.



As I read the case, and as it has been interpreted in later cases, the decision in this case turned on the fact that the Bank of Scotland had what was called a "floating capital which was laid out in the purchase of exchequer and navy bills, in discounts and in every species of property that can be turned into cash at pleasure". Lord Eldon said at pp. 530-1: "Every person who buys bank stock is aware of this; and if he gives the life interest of his estate to any one, it can scarcely be his meaning that the liferenter should run away with a bonus that may have been accumulating on the floating capital for half a century."

In *Paris v. Paris*, *supra*, Lord Eldon held, following prior decisions, that an extraordinary dividend declared by the Bank of England was capital in the hands of the trustee, and refused to draw a distinction between a dividend distributed in cash and one distributed by an issue of stock and he did not consider that the fact that the fund out of which the dividend was declared was earned during the lifetime of the tenant was relevant.

In *In re Barton's Trust* shares in a company were settled upon trust to pay A during her life "the interest, dividends, share of profits, or annual proceeds," and after her death in trust for her children. During the lifetime of the life tenant the company by resolution applied a portion of "the net earnings during the half-year" to necessary works and issued new shares to represent the money so applied. Vice-Chancellor Sir W. Page Wood held that the shares so issued were capital in the hands of the trustee. This case, like others I shall discuss, dealt with an ordinary issue of shares to which surplus earnings were credited. No question of redemption arose.

These cases were fully considered in *In re Bouch; Sproule v. Bouch* (1885), 29 Ch. D. 635, reversed *sub nom. Bouch et al. v. Sproule* (1887), 12 App. Cas. 385. This is a much-discussed case. In order to appreciate the force, meaning and effect of the language used by the learned law lords in the House of Lords, it is necessary to examine the nature of the argument before Kay J. and the learned Lords Justices of Appeal. The directors of the company, in which the testator held shares, had power, before recommending a dividend, to set apart out of the profits such sum as they thought proper as a reserve fund, for meeting contingencies, equalizing dividends, or repair-

ing or maintaining the works. The directors recommended that the reserve fund and "undivided profit" be distributed as a "bonus dividend" of £2 10s. per share, and that there should be created new £10 shares amounting in number to one-third of the original shares, on which £7 10s. had been paid up, so that one new share might be allotted to each shareholder for every three original shares which he held, £7 10s. per share to be paid on allotment, which £7 10s. the bonus would enable him to pay. The recommendation of the directors was adopted, and at a general meeting of shareholders a warrant was issued to each shareholder for the bonus to which he was entitled, in the following form:

" *Consett Iron Company Limited*

"Bonus dividend warrant of £2 10s. per share, payable on the 30th of September, 1880, to the members registered in the company's books on the 25th of September, 1880.

"No. 102

"Name of member: *Thomas Bouch*, Esq.

"Number of shares: 600.

"Amount of bonus dividend: £1500.

"*William Cockburn*, Registrar.

"I hereby authorize and request you to apply the above amount in payment of the call of £7 10s. per share on the 200 new shares that have been allotted to me pursuant to the special resolutions passed &c.

"Signature of member, ."

The trustees accepted the dividend warrant and the shares, signed the memorandum and returned it to the company. The 200 shares in the company allotted to the trustee were thereupon registered in his name with £7 10s. credited on each share. The argument presented before Kay J. on behalf of the life tenant was that the form of the resolution and the form of the warrant showed that the bonus was against dividends and that the moneys arising from the undivided profits were expressly divided by the directors as a bonus dividend. Kay J. considered that the case was extremely like *Paris v. Paris, supra*, and it was doubtful if the bonus dividend would in any case have gone to the life tenant. He pointed out that the shares had been allotted when the bonus dividend was issued to the trustee and if the trustee had refused to accept the shares, under the articles

of association the company might have cancelled the shares and the shares would have been forfeited, and accordingly he held against the life tenant. In the Court of Appeal the argument was: Whether a bonus is capital or not depends upon whether the company makes it capital or income; a bonus dividend is income unless the company does something to make it capital; here the company did not, it was only the act of the trustee that made it capital; the bonus dividend came to the hands of the trustee as money, he applied it in taking up shares, and the shares therefore belonged to the life tenant. The case of *In re Barton's Trust*, *supra*, was distinguished on the ground that the company simply allotted new paid-up shares. In addition, much of the argument in the Court of Appeal was addressed to whether or not the fund from which the distribution was made was earned during the lifetime of the testator and the effect of the decisions on this question. The arguments dealt with were stated by Fry L.J. as follows:

"In addition to the argument from acquiescence or conduct, two other arguments have been adduced on behalf of the Defendants. First, that independently of the way in which the company associated the declaration and payment of the bonus with the issue of new share capital, the bonus had become capital; and secondly, that if not so, yet that in the present case the bonus was in fact, by the proceedings of the company, converted into share capital."

The learned lord justice then reviewed in detail the relevant cases and particularly the statement of Lord Hatherley in *In re Barton's Trust*, *supra*, at p. 245, where he said: "Where the company, by a majority of their votes, have said that they will not divide this money, but turn it all into capital, capital it must be from that time. I think that is the true principle."

And at p. 655 Fry L.J. said: "Furthermore, the question whether profits remain income or have been capitalized is in its nature a mere question of fact, and unless a series of decisions as to the effect of similar proceedings by companies, has, so to speak, turned this question of fact into a question of law, we should not regard the decisions as binding on the inquiry."

And, after discussing a number of decisions dealing with bank stocks, at p. 656 he said: "These cases, however binding they may be under similar circumstances with regard to the



same stocks, certainly do not appear to us to support to any extent the proposition now under investigation."

And at p. 658:

"These cases are sufficient to shew that there has been no such continuous and unbroken current of authorities as would be required to establish such a doctrine as was contended for, viz., that payments out of accumulated profits were necessarily to be treated as payments out of capital. On the contrary, as is reasonable, the authorities leave the *inquiry as one of fact upon the circumstances of each case.*

"The authorities appear to us further to establish this proposition, that in most, if not in all, cases, the inquiry as to the time when the profits were earned by the company is an immaterial one as between the tenant for life and remainderman. Their rights have been made dependent on the legitimate action of the company, and (subject to any rights arising from the law of apportionment, with which we are not now dealing) we are of opinion that their rights are determined by the time, not at which the profits are earned by the company, but at the time at which they are by the action of the company made divisible amongst its members." (The italics are mine.)

He concluded that the trustee had a right to demand the dividend and it was not contingent upon accepting the shares and they therefore accrued to the benefit of the life tenant. At p. 659, he said: "The resolution of the company as to the payment of the bonus is a substantive and independent resolution, and we do not think that it authorized the directors to make the payment of the dividend contingent on the acceptance of the new shares. Nor do we think that the directors did by their acts make the payment of the dividend contingent on the acceptance of the shares."

This statement throws in clear relief the precise problem dealt with in the House of Lords. There it was argued on behalf of the appellant, that:

(1) Whenever out of accumulated profits, which are part of the capital of the company, a dividend or bonus is declared in addition to the ordinary dividend, it is an accretion to the capital, and the corpus belongs to the remainderman.

(2) If it is not all capital there should be an apportionment according as the profit accrued during the testator's life or afterwards.

On behalf of the respondent it was argued that a bonus dividend becomes income as soon as it is declared, whether as bonus or dividend, unless the company makes it capital. In this case it was made capital by the trustees, not by the company, and it made no difference that the dividend arose from accumulations made during the testator's life.

It is to be emphasized that counsel did not argue that if the company made the dividend capital, it could in any sense be regarded as income. Lord Herschell discussed all the antecedent cases and particularly *Irving et al. v. Houstoun, supra*, and at p. 397 stated that: "[It] must still be regarded as good law, unaffected by any counter-current of authority. But it is, in my opinion, an authority governing only a case similar in its facts; that is to say, a case where the company has no power to increase its capital, but has accumulated profits and used them, in fact, for capital purposes, and afterwards distributes these profits amongst the proprietors. I think it will be seen that there is a substantial reason for the limitation I have suggested."

The Lord Chancellor went on to say: "I quite agree with the Court below that, apart from the authorities to which I have alluded, the general principle for the determination of such a question as that before us, and in my opinion the only sound principle, is that which is well expressed in the judgment of Lord Justice Fry: *'When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital.'* And it appears to me that where a company has power to increase its capital and to appropriate its profits to such increase, it cannot be considered as having intended to convert, or having converted, any part of its profits into capital when it has made no such increase, even if a company having no power to increase

its capital may be regarded as having thus converted profits into capital by the accumulation and use of them as such.” (The italics are mine.)

He then proceeded to consider whether the company did distribute the accumulated profits as a dividend or convert them into capital, and decided that in the form of the transaction it was not contemplated that any money would pass to the shareholders, and his conclusion was that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly-created shares, and that the company did not pay, or intend to pay, any sum as dividend, but intended to and did appropriate the undivided profits dealt with as an increase of the capital stock in the concern.

Lord Watson at p. 402 said: “In these circumstances it was undoubtedly within the power of the company, by raising new capital to the required amount, to set free the sums thus spent out of the reserve fund and undivided profits for distribution among the shareholders. It was equally within the power of the company to capitalise these sums by issuing new shares against them to its members in proportion to their several interests. I am of opinion that the latter alternative was, in substance, that which was followed by the company.”

Lord Bramwell placed his judgment on the basis that the £7 10s. received for each of the three common shares could not be said to have bought a new share, for the price of the new shares was that sum and the diminished value of the old shares.

Lord Fitzgerald did not disagree with the Court of Appeal as to the law but as to the inferences to be deduced from the admitted facts, and held that the declaration of a bonus or dividend was coupled with the creation of new capital and amounted to a capitalization of the bonus, and the reasoning in *In re Barton's Trust*, *supra*, directly applied.

*Commissioners of Inland Revenue v. Blott; The Same v. Greenwood*, [1921] 2 A.C. 171, was a case involving taxation and whether the recipient of second preference shares that had been issued as fully paid in satisfaction of a bonus dividend declared was liable for super-tax. Viscount Haldane said, at p. 179:

“What we have to decide is whether the allotment of bonus shares to the respondent was capital, or was in reality an



allotment of annual profits which conferred a benefit chargeable in his hands with income tax, for if so it is not in controversy that the super-tax provisions will apply."

After discussing *Bouch et al. v. Sproule* and stating his views of the effect of corporate action he said, at p. 182: "The company, acting with the assent so given of the shareholders, can decide conclusively what is to be done with accumulated profits. It need not pay these over to the shareholders. It can convert them into capital as against the whole world, including, as I think the principle plainly implies, the Crown claiming for taxing or for any other purposes. The only question open is, therefore, whether the company has really done so."

And at p. 184: "My Lords, for the reasons I have given I think that it is, as a matter of principle, within the power of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether it will withhold profits it has accumulated from distribution to its shareholders as income, and as an alternative not distribute them at all, but apply them in paying up the capital sums which shareholders electing to take up unissued shares would otherwise have to contribute. If this is done the money so applied is capital and never becomes profits in the hands of the shareholders at all."

At p. 186, in discussing the effect of the judgments in *Bouch et al. v. Sproule* the learned Lord Chancellor reaffirmed the principle of law to be applied as that set out by Lord Justice Fry which I have already quoted in the passage from the judgment of Lord Herschell. At p. 197 Viscount Finlay considered *Bouch et al. v. Sproule* and said: "The incidence of the taxation depends upon the question, What is in fact the nature of the property on which the tax is claimed? If it is income it is liable to tax upon income; if it is capital it is not so liable. The liability follows from the nature of the property, and it seems impossible to me to say that the answer to the question whether it is income or not is to depend upon the purpose with which the question is asked. The circumstances which gave rise to the case of *Bouch v. Sproule* are very like those in the present case."

And at p. 198 he pointed out that the option left to the shareholder to accept the dividend warrant was a nominal one

and in the present case there was no option at all. The application of the bonus to increase the capital was compulsory. This last observation may be applied with emphasis to the case I am considering.

Lord Dunedin, dissenting, held that the decision in *Bouch et al. v. Sproule* did not apply where taxation was involved.

Lord Sumner, also dissenting, dealt at length with *Bouch et al v. Sproule* and accepted everything laid down in it, but held that it did not apply to a taxing statute. At p. 220, in interpreting the language of Lord Herschell in that case, he said: "What he meant was something highly germane to the issue—namely, that the plan, which the company carried out, was not a mere plan for paying the usual dividend in a novel form, but was a more far-reaching design to bring about an increase in statutory capital without physically parting with cash. Such a design has a legal effect on those whose rights only arise on the footing that the design has been accepted and affirmed; it has none on the officers of the revenue, whose rights are statutory and independent, and intervene before the point is reached, at which the interests of parties like those in *Bouch v. Sproule* become concerned."

In *Commissioners of Inland Revenue v. Fisher's Executors*, [1926] A.C. 395, *Blott's* case was considered and applied in the House of Lords to the distribution of debenture stock out of earned profits. This was no doubt done so that the shareholders would not be subject to income tax on it.

Lord Shaw of Dunfermline, at p. 406, said: "Upon the legal side of the matter it must not be forgotten that all the necessary resolutions, confirmations, new articles of association, etc., required to regularize the transaction have been carried through. It is a transaction in itself unassailable in law. The result of it was to negate emphatically the idea of distribution to shareholders as income; on the contrary, it was to withdraw from each shareholder the sum which might have been given to him as income and to withdraw it definitely from an income fund. It was stamped as a capitalization transaction. Such a transaction was within the power of the shareholders of the company, and all, including the Crown, are bound by that. *It is incorrect in principle to attempt to get behind that transaction, legal and competent and regular in form, and to endeavour to*

*construct a canon of liability to income tax out of conjecture as to the motive or scheme for the defeat of the revenue which underlay its various stages. The money so capitalized could not pass to a tenant for life. If the company were wound up, the whole would still be treated as its existing assets."* (The italics are mine.)

At pp. 410-1 Lord Sumner referred to certain expressions in *Bouch et al. v. Sproule* as to form and substance and at p. 411 he said: "The proposition, that the substance of a transaction must be looked to and not merely the form, is generally invoked against those who have carried it out. I think it is unusual, where the form of a transaction is against those, whose transaction it is, to invoke the substance in their favour, in order to eke out what they have left defective in form. Sometimes again it is the 'intention' of the company that is said to be dominant: *Burrell's case* [*Inland Revenue Commissioners v. Burrell*] ([1924] 2 K.B. 52 at p. 68): sometimes it is what the company 'desired' to do [*Blott's case*] ([1921] A.C. at p. 200). *In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers. The only intention, that the company has, is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company's resolutions and instruments is their substance.*" (The italics are mine.)

Any consideration of the relevant cases must involve reference to *In re Bates; Mountain v. Bates*, [1928] Ch. 682, a decision of Eve J., whose judgments have always carried great weight. A director of a company owning and operating steam trawlers sold some of the vessels for sums exceeding the values at which they stood in the company's balance-sheet and carried the proceeds to a suspense account, and afterwards distributed them as cash bonuses to the shareholders with a covering letter stating that such bonuses were capital payments and not liable to income tax. In distribution of the warrants prominence was given to the statement that the payments were being made out of capital and were not in the nature of a dividend or bonus of shares. This was to protect the recipients from liability to taxation.

At p. 687 Eve J. said: " . . . but the mere impressing of these distributions with the appellation of 'capital distributions'



cannot in my opinion determine their true character. One must inquire a little closer for the purpose of ascertaining whether they were in fact distributions of capital or distributions of something which, although in one sense capital, in that it originated by the realization of assets and not from the ordinary income of the company's business, could not properly be regarded as capital for all purposes. The suspense account represented realized profit on the company's capital assets, and inasmuch as the equilibrium between capital and liabilities on the one side and assets on the other was maintained without any necessity to resort to this fund, it represented what I think is spoken of in one of the cases as 'the total appreciation of the capital assets'; that is to say, if you take on one side the liabilities of the company and on the other the whole of its assets the latter exceed the former by a sum which is in excess of the whole of this suspense fund, or, in other words, no part of it is required to satisfy either the creditors or shareholders of the company. In this state of affairs it was a fund which the company could treat as available for dividend and could distribute as profits, or *having regard to its power to increase capital could apply to that purpose by, for example, increasing the capital, declaring a bonus and at the same time allotting to each shareholder shares in the capital of the company paid up to an amount equivalent to his proportion of the bonus so declared. Unless and until the fund was in fact capitalized it retained its characteristics of a distributable profit, and on the authority of the passages which have been read from Lord Herschell's speech in Bouch v. Sproule, the only method by which a company with power to increase its capital can capitalize such a fund is to increase its capital by an amount equivalent to the sum sought to be capitalized.*" (The italics are mine.)

In *Hill et al. v. Permanent Trustee Company of New South Wales, Limited et al.*, [1930] A.C. 720, all cases to which I have referred were comprehensively considered by the Judicial Committee of the Privy Council and Lord Russell of Killowen, writing the judgment, appeared to endeavour to set at rest any confusion that might have arisen in the interpretation of the language used in the *Sproule* case and succeeding cases. At p. 730 he referred to the basis of the judgment in the Australian Courts where the decision assumed that the answer to the

question whether the dividend was capital or income depended upon "what was the intention of the company in making the distribution". Upon the whole evidence the trial judge came to the conclusion that the distribution was in fact and was intended by the company to be a distribution of capital assets in anticipation of liquidation. He further held that in order to convert the profits into corpus, as between tenant for life and remainderman, no conversion by the company of the profits into share-capital was necessary, but that profits distributed might be corpus as between tenant for life and remainderman, even though no formal part of the fund was retained by the company in a capitalized form. He realized that this was in conflict with *In re Bates* but he felt bound by previous decisions of the High Court of Australia in *Knowles v. Ballarat Trustees, Executors and Agency Company Limited et al.*; *Haslem v. The Same* (1916), 22 C.L.R. 212, and *Fisher v. Fisher et al.* (1917), 23 C.L.R. 337.

The learned law lord, before referring in detail to the cases, laid down five principles of law, at pp. 730 *et seq.*:

"(1.) A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no concern to a company which is parting with moneys to a shareholder whether that shareholder (if he be a trustee) will hold them as trustee for A. absolutely or as trustee for A. for life only.

"(2.) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called 'dividend' or 'bonus', or any other name, it still must remain a payment on division of profits.

"(3.) Moneys so paid to a shareholder will (if he be a trustee) *prima facie* belong to the person beneficially entitled to the income of the trust estate. If such moneys or any part thereof are to be treated as part of the corpus of the trust

estate there must be some provision in the trust deed which brings about that result. No statement by the company or its officers that moneys which are being paid away to shareholders out of profits are capital, or are to be treated as capital, can have any effect upon the rights of the beneficiaries under a trust instrument which comprises shares in the company.

“(4.) Other considerations arise when a limited company with power to increase its capital and possessing a fund of undivided profits, so deals with it that no part of it leaves the possession of the company, but the whole is applied in paying up new shares which are issued and allotted proportionately to the shareholders, who would have been entitled to receive the fund had it been, in fact, divided and paid away as dividend.

“(5.) The result of such a dealing is obviously wholly different from the result of paying away the profits to the shareholders. In the latter case the amount of cash distributed disappears on both sides of the company's balance sheet. It is lost to the company. The fund of undistributed profits which has been divided ceases to figure among the company's liabilities; the cash necessary to provide the dividend is raised and paid away, the company's assets being reduced by that amount. In the former case the assets of the company remain undiminished, but on the liabilities' side of the balance sheet (although the total remains unchanged) the item representing undivided profits disappears, its place being taken by a corresponding increase of liability in respect of issued share capital. *In other words, moneys which had been capable of division by the company as profits among its shareholders have ceased for all time to be so divisible, and can never be paid to the shareholders except upon a reduction of capital or in a winding-up.* The fully paid shares representing them and received by the trustees are therefore received by them as corpus and not as income.” (The italics are mine.)

*Bouch et al. v. Sproule* was referred to at p. 732, where Lord Russell stated: “It is not an authority which touches a case in which a company parts with moneys to its shareholders. The essence of the case was that the company, not by its statements, but by its acts, showed that what the shareholders got from the company was not a share of profits divided by the company, but an interest in moneys which had been con-



verted from divisible profits into moneys capitalized and rendered for ever incapable of being divided as profits. In those circumstances it was held that shares which were issued to a trustee shareholder, and which represented the moneys so capitalized, were as between his cestuis que trust corpus and not income, because the company had decided that the profits in question should be permanently added to the company's capital."

The *ratio decidendi* of that decision, as I conceive it to be, is that where a shareholder is a trustee what is in the minds of the directors or shareholders when a distribution is made is not relevant in considering what are the respective rights of life tenant and remainderman. The company manifests its intention by its acts and its acts only. Injustice may result but if a testator makes no provision in his will with respect to this aspect of his estate, the law must take its course and it is not for the Court to do otherwise than give effect to the legal acts of the company. In the case before the Judicial Committee there was no issue of shares and no increase in capital and it was decided that, notwithstanding that there was a declaration that the company was paying a dividend for the purpose of making a distribution of its capital assets in advance of winding-up, the dividend nevertheless belonged to the life tenant.

The last judgment of the Judicial Committee dealing with the subject matter is *Commissioner of Income-Tax, Bengal v. Mercantile Bank of India, Limited et al.*, [1936] A.C. 478. This was a revenue case and was decided under the provisions of the Indian Income Tax Act, but certain statements of Lord Thankerton are relevant to the question here under consideration. He referred to *Blott's* case, *supra*, at p. 493 and adopted the interpretation of the principle placed on it in *Fisher's* case, [1926] A.C. 325, by Lord Cave, who quoted from the opinion of Lord Haldane which I have already quoted in considering the *Blott* case, and at p. 495 Lord Thankerton said:

"Lastly, *their Lordships are clearly of opinion that the personal motive or purpose of the individual shareholders, even if they hold a controlling interest in the company, is irrelevant, if it is made out that the company has in fact capitalized the accumulated profits.*" (The italics are mine.)

And at p. 496: "It is hardly a paradox to say that the *form* of a company's resolutions and instruments is their substance."

*Aykroyd v. Commissioners of Inland Revenue*, [1942] 2 All E.R. 665, is another revenue case and the decision of a single judge, Macnaghten J. Counsel for the life tenants relies on the statement of the learned judge where he said at p. 668: ". . . the question whether the debentures issued by the Firth Carpet Co. should be regarded as capital or as income depends to some extent on the prospect of their redemption—a matter which Lord Sumner considered to be immaterial." The learned judge was referring to the opinion of Lord Sumner in the *Fisher* case. With great respect, I cannot entirely agree with the interpretation that the learned judge put on the judgments of the learned law lords in the *Fisher* case, nor do I treat the language of Lord Sumner in the same manner. It is not clear to me that the other learned law lords were in disagreement with him. The passage quoted from the judgment of Viscount Cave, at p. 668, in my view tends to support the view of Lord Sumner where it is said: "The company was, therefore, master of the situation, and it elected definitely and irrevocably not to distribute the fund as income, but to impound and apply it as income-producing capital; and that election, if made (as I do not doubt that it was made) in good faith, was binding on the shareholders and could not be questioned by the Crown. . . . The whole transaction was 'bare machinery' for capitalising profits and involved no release of assets either as income or as capital."

In *In re Doughty; Burridge et al. v. Doughty et al.*, [1947] Ch. 263, a company having power by its articles of association to distribute dividends in specie, and, in particular, dividends by way of capitalization of profits by the distribution of paid-up shares, debentures or debenture-stock of the company, did not act under this power but under another power given by its articles of association that: "The company in general meeting or the directors . . . may . . . pass a resolution . . . that any surplus capital moneys or capital profits in the hands of the company whether arising from the realization of capital assets . . . or received in respect of any capital assets . . . shall be divided amongst the members of the company by way of capital distribution in proportion to their rights." It was held that

the power under which the company acted, on its true construction, merely authorized the distribution of capital profits and did not purport to fix their character as between tenant for life and remainderman; and that accordingly the sums received by the executors were to be treated as income. Cohen L.J. at p. 270 set out in full the principles that I have already quoted from the judgment of Lord Russell of Killowen in *Hill et al. v. Permanent Trustee Company of New South Wales, Limited et al.*, and at p. 271 he emphasized that the moneys were clearly not capitalized under the first paragraph of the articles to which I have referred. From a careful reading of the judgment it would appear that if they had been no difficulty would have arisen in the case.

In *In re Harrison's Will Trusts; Harrison et al. v. Milborne-Swinnerton-Pilkington et al.*, [1949] Ch. 678, Roxburgh J. considered a case where a company, having no power in its articles to increase its capital, adopted an article enabling it at any time to resolve that any surplus moneys in its hands representing moneys received or recovered in respect of or arising from any of its capital assets or investments representing them be distributed among its members on the footing that they receive them as capital. The company made distributions under the article and the question was raised whether the proceeds were held by the trustees as capital or income. The learned judge followed *In re Doughty*.

In *Re Sechiari (deceased); Argenti v. Sechiari*, [1950] 1 All E.R. 417, Romer J. held that where a company had sold its assets and taken in payment therefor shares in another company, and distributed the same to its shareholders in specie, in proportion to their holdings, the trustees held the shares as income in their hands. He relied on the second principle enumerated by Lord Russell of Killowen in the *Hill* case.

*In re Duff's Settlements; National Provincial Bank Ltd. v. Gregson et al.*, [1951] Ch. 923, [1951] 2 All E.R. 534, is the most recent decision of the English Court of Appeal and it contains reasoning that I think is very applicable to the case before me, notwithstanding that the facts are dissimilar. The trustees were holders of shares in a company which from time to time allotted shares at a premium and, in accordance with s. 56 of The Companies Act, 1948, transferred the aggregate of the



premiums to a share premium account. In 1950 the company passed a resolution to pay thereout 2s. 6d. in respect of each fully-paid share. The resolution was sanctioned and the trustees received a proportionate sum in respect of the shares held by them. Section 56 of the English Companies Act reads as follows:

“(1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called ‘the share premium account’, and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid up share capital of the company.

“(2) The share premium account may, notwithstanding anything in the foregoing subsection, be applied by the company in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares . . .

“(3) Where a company has before the commencement of this Act issued any shares at a premium, this section shall apply as if the shares had been issued after the commencement of this Act. . . .”

At p. 926 Jenkins L.J., giving the judgment of the Court, stated that had it not been for the provision of s. 56 of The Companies Act, if the company had distributed among its shareholders any of the sums representing premiums received on the distribution of shares, the proportion of such distribution attributable to any trust holding of shares would have been income and not capital as between persons successively interested under the trust, following *In re Bates; Hill et al. v. Permanent Trustee Company of New South Wales, Limited et al.*; *In re Doughty* and *Re Sechiari*. He went on, however, to say:

“The share premiums would have been profits available for dividend (see *Drown v. Gaumont-British Picture Corporation*, [1937] Ch. 402), and if any part of them had been distributed by the company otherwise than in liquidation the amount received by trustees in respect of a trust holding would necessarily have been income in their hands, because it was neither a payment in reduction of paid up share capital nor an addition to the shareholders’ capital investment in the company, but simply a cash distribution which, no matter how described, and

notwithstanding that in the hands of the company it bore the character of a capital, not an income, profit could not in law be anything else in the hands of the recipients than income derived from their shareholdings.” (The italics are mine.)

At p. 928 the learned lord justice dealt with the effect of s. 56 of The Companies Act and held that the section took the share premium account out of the category of divisible profit and prevented it from being distributed by way of dividend. After referring to the cases I have already quoted, he said: “Moreover, the terms of the section seem to us to show that where (as in the present case) the transaction in question is a distribution amongst shareholders of the share premium account, or part thereof, that transaction is to be treated as if the company was reducing its capital by paying off paid up share capital.”

And at p. 929: “What reason is there for holding that the capital character with which the trustees’ portion of the amount was thus impressed when it left the company was effaced and replaced by an income character when it reached the hands of the trustees? For our part we can see none. We think the hypothesis enjoined by the section must follow the amount received by the trustees and determine its character and destination in their hands also. *The cases to which we have referred show that the character, as a matter of company law, of any given distribution as it leaves a company determines its character in the hands of the recipient.* The relevant company law in the present case seems to us to require that the distribution here in question should be treated from the point of view of the payer, that is, the company, as a distribution by way of return of capital. It follows, to our minds, that the trustees’ proportion of the distribution should similarly be treated in their hands as paid up capital returned by the company.” (The italics are mine.)

At p. 930 the learned lord justice made a comment very relevant to the case before me: “The section, as we read it, produces the same result on a direct distribution of a share premium account as if the company had first gone through the formality of actual capitalization by bonus shares and then paid off the bonus shares by way of reduction of capital.”

And on the same page he dealt with the argument with reference to the "mechanics" (provided by s. 56) in these words:

" . . . still the 'mechanics' are, in our judgment, an essential factor in determining the character as between capital and income of the sum distributed. A company, having an artificial person, can (as it has been laid down) make a distribution amongst its members (otherwise than in a winding-up) in one of two ways—but only in one of two ways: that is, by a distribution of divisible profit, that is by way of dividend; and by way of a return of capital pursuant to an order of the court upon a petition for reduction of capital in accordance with the Act."

Under s. 61 of The Companies Act, 1934 (Can.), c. 33, the redemption of fully-paid-up preference shares, in accordance with the letters patent or supplementary letters patent or by-laws, shall not be deemed to be a reduction of capital in certain defined circumstances, and in these circumstances alone. They are these:

(1) if the redemption is made out of the proceeds of an issue of shares made for the purchase of such redemption; *or*

(2) where no cumulative dividends on preferred shares or shares of the same class are in arrears, *and*

(a) the redemption is made without impairment of the company's capital out of ascertained net profits of the company that have been set aside by the directors for the purposes of the redemption, *and*

(b) such net profits are available to be applied for the redemption of the shares in liquid form as certified by the company's last balance-sheet, being made up to date not more than ninety days prior to the redemption, after giving effect to the redemption.

Where shares are so redeemed, the surplus resulting therefrom shall be designated as a capital surplus and shall not be reduced or distributed by the company except as provided in ss. 49 to 58 which deal with means of reducing capital.

It is to be noted that what s. 61 provides for is the redemption or purchase for cancellation of *fully-paid* preferred shares. At p. 330 the learned author of Masten and Fraser, Company Law of Canada, 4th ed. 1941, comments on this and



states that: "By implication the section appears to require compliance with ss. 49 and following in respect of a reduction of capital in the case of a redemption or purchase for cancellation of preferred or other redeemable shares, made otherwise than in accordance with the conditions set out in the section."

It is further stated: "It will be noted that the shares to be purchased or redeemed must be fully paid and that, unless the redemption or purchase is made out of the proceeds of a fresh issue of shares, there must be no arrears of cumulative dividends and the redemption or purchase must be made out of ascertained net profits, available as liquid assets, set aside by the directors for the purpose. In order to comply with the section it is necessary to have a balance sheet certified by the company's auditors made up to a date not more than ninety days prior to the redemption or purchase showing the requisite available net profits and that the directors should have set aside ascertained net profits of the company for the purpose."

The question was not argued before me and has no bearing on the subject I have to decide, except as to whether *Re Fleck, supra*, and *Re Mills, supra*, are binding upon me in this case, but in the absence of argument if this procedure is followed it is difficult for me to see how a company can appropriate from its profits a fund to be applied as the capital of *fully-paid* preference shares and so draw its balance-sheet and then use the same fund to redeem the shares without reduction in capital in compliance with ss. 49-58 of the Act. On the other hand, the provision in s. 61 is that the redemption of preference shares is not to be taken as a reduction of capital, if in fact the shares, after having been fully paid up, are redeemed out of profits that have not been appropriated to create the fully-paid-up preference shares.

There is, however, no provision in The Companies Act, R.S.O. 1950, c. 59, similar to that contained in s. 61 of the Dominion Act. Sections 78 to 82 deal with preference stock. Section 78(2) states:

"The directors of a company may make by-laws,

"(a) for creating and issuing any part of the *capital* as preference shares."

Section 80 provides for the creation or issuance of preference shares and that the by-law "may provide for the purchase or

redemption of such shares by the company as therein set out". The limitation of the rights of holders of the shares must be fully set out on the certificate. Subsection 2 is important:

"No such by-law which has the effect of *increasing or decreasing* the capital of the company, or increasing the amount of the preference stock authorized by the special Act [or] letters patent . . . shall be valid or acted upon until confirmed by supplementary letters patent." (The italics are mine.)

Subsection 3 qualifies subs. 2 in that it does not apply to a by-law which creates or attempts to create redeemable or convertible preference shares, but a certified copy of the by-law must be filed forthwith with the Provincial Secretary.

Coupled with these sections is to be read s. 96:

"For the amount of any dividend which the directors may lawfully declare payable in money, they may declare a *stock dividend* and issue therefor shares of the company as *fully paid* or partly paid, or may credit the amount of such dividend on the shares of the company already issued but not fully paid, and the liability of the holders of such shares shall be reduced by the amount of such dividend."

This brings me to consider the two cases bearing on the subject in our own Courts. *Re Fleck, supra*, was a decision of Hogg J.A., affirmed in the Court of Appeal. Some of the facts in this case are similar to the case I have under consideration and some are dissimilar. There Hogg J.A. was dealing with a so-called dividend of a company incorporated under the Dominion Companies Act. A resolution of the directors recited (a) that the company had on hand \$606,488.60 "undistributed income" at the end of the taxation year of 1949; (b) that dividends of \$606,000 had been paid from the commencement of business in 1943 to 1950; and (c) the provisions of The Income Tax Act whereby upon the payment of 15 per cent. of the amount of undistributed income at the end of the 1949 taxation year the balance of such undistributed income might rank as tax paid undistributed income in the form of redeemable shares which will be tax-free to the shareholders and the company may thereafter redeem the said shares subject to the provisions of The Companies Act; and (d):

"And whereas the Company may, after first paying the aforesaid special tax in respect of its undistributed income as at December 31, 1949, pay a like special tax on that portion

of income earned in 1950 and subsequent years that is equivalent to the amount of ordinary dividends paid in such years and thereby have the balance of said portion of income rank as tax paid undistributed income which may thereupon be distributed in the form of redeemable shares tax free to the shareholders and be thereafter redeemed subject to the provisions of the Companies Act."

The company then passed a by-law authorizing the issue of a stock dividend and passed a resolution declaring a stock dividend out of the undistributed income and on the same date passed a resolution reciting that the company had issued \$1,000 non-cumulative redeemable 5% preferred shares of the par value of \$100 each and resolved that the shares be redeemed and they were accordingly redeemed. It does not appear that any share certificate was actually issued or any evidence of title to the shares ever came into the hands of the shareholders.

The learned judge, after discussing some of the cases to which I have referred, stated the principle of law to be applied in all these cases at p. 119: "The principle to be deduced from these judgments is that there must be, in fact, a conversion by the company of its profits or surplus into share capital in order that they shall be regarded as corpus and not income in the hands of a trustee, or as between a life tenant and a remainderman. Furthermore, that where a company has the power to deal with profits by converting them into capital of the company such exercise of its power is binding upon the person interested under a trust of the original shares set up by the testator's will."

In applying the principle he said at p. 120: "These shares did not form part of the paid-up capital of the Company and therefore the surplus profits represented by them were not capitalized. The steps taken by the Company were induced because of the provisions of The Income Tax Act. When redeemable preferred shares are issued pursuant to s. 59 of The Companies Act, 1934 (Can.), c. 33, s. 61 provides that the redemption of such shares is not to be deemed a reduction of the paid-up capital stock of the Company if such redemption is made according to the conditions stipulated."

The fund in the hands of the trustees as a result of the redemption of the shares was held to be for the benefit of the life tenant.



In the Court of Appeal the cases were not discussed by the Court but it was held that the money constituted income in the hands of the trustees and went to the life tenant. It is to be observed that Hogg J.A. based his decision squarely on the provisions of the Dominion Companies Act and held that the shares coming into the hands of the trustees did not form part of the paid-up capital of the company.

In *Re Mills, supra*, my learned brother Gale followed *Re Fleck, supra*, with respect to the issue and redemption of shares in a Dominion company where the circumstances were somewhat different.

If I felt that the *Fleck* case and the *Mills* case applied to the facts before me I would unquestionably follow them, but, with respect, I do not think they do. Whether the procedure followed in those cases complied with s. 61 of the Dominion Act is not for me to discuss as the point was not argued before me and does not appear to have been argued in those cases. The Ontario Act is, however, as I have pointed out, distinctly different from the Dominion Act. In the case before me the directors applied to the Provincial Secretary for, and obtained, supplementary letters patent which (a) designated the 5,000 shares of the capital stock of the company of \$100 each as 5,000 common shares of \$100 each; and (b) *increased* the capital stock of the company from the sum of \$500,000 to the sum of \$1,000,000 by the creation of \$500,000 5% non-cumulative redeemable preference shares of \$1 each ranking in priority to the common shares. The rights and conditions attached to the preference shares were set out in the supplementary letters patent and the share certificates were evidence of an interest in the capital of the company. The balance-sheet for the year 1950 showed among the liabilities a capital surplus (re sale of hotel) of \$169,900.38, and a share-capital of 4,850 shares of \$100, amounting to \$485,000. Following the issue of the supplementary letters patent on the 9th February 1951 the balance-sheet as of 31st October 1951 showed on the liability side:

“CAPITAL

“Authorized

500,000 Non-Cumulative Redeemable

Preferred Shares of \$1.00 par

value .....

500,000.00

|                                                          |              |             |
|----------------------------------------------------------|--------------|-------------|
| 5,000 Common Shares of \$100. par value .....            | 500,000.00   |             |
|                                                          | <hr/>        |             |
|                                                          | 1,000,000.00 |             |
|                                                          | <hr/>        |             |
| "Issued                                                  |              |             |
| 276,935 Non-Cumulative Redeemable Preferred Shares ..... | 276,935.00   |             |
| Less 107,185 Shares Redeemed .....                       | 107,185.00   |             |
|                                                          | <hr/>        |             |
|                                                          | 169,750.00   |             |
| 4,850 Common Shares .....                                | 485,000.00   | 654,750.00" |
|                                                          | <hr/>        |             |

In the light of the authorities I have discussed it seems to me clear that the company in fact and in law capitalized the capital surplus and when the certificate for 26,250 shares came into the hands of the trustee it was evidence of a capital interest in the company to the extent of its holdings. Adopting the language of Griffith C.J. in *Knowles v. Ballarat Trustees, Executors and Agency Company Limited et al.*; *Haslem v. The Same, supra*, a share in a joint stock company is a legal entity which connotes a right to an ascertained part of the property of the company and is evidenced by documents, which include a share-register and share-certificates. When the trustee received the certificate for the shares which I am now considering that is precisely what it had. If by reason of any unforeseen circumstances, such as I have heretofore referred to, the shares had not been redeemed and the company had been wound up, the holders of the preferred shares could not have been denied their right to be paid in full the amount "paid up on the preferred shares" together with all the dividends declared and unpaid, out of the assets of the company, as set out in para. 4 of the endorsement on the certificates.

In fact, the company was doing nothing more than capitalizing its capital surplus until it should be in liquid funds so that the shares might be redeemed without any question arising as to taxation. In fact, as I read The Income Tax Act, the capital surplus might have been distributed in the circumstances in cash without being taxable. To apply the language of Jenkins L.J. in *In re Duff's Settlements, supra*, and the

language of Lord Russell of Killowen in the *Hill* case, *supra*, the character, as a matter of company law, of any given distribution as it leaves the company determines its character in the hands of the recipient, and therefore, when these preferred shares were issued as against the fund in question, the fund had been rendered incapable of being distributed as profits.

As between tenant for life and remainderman the corporate acts of the company determine their rights, and when I say this I use the words advisedly and I mean the corporate acts having regard to their legal consequences in relation to the corporate structure, as distinct from any declaration which does not affect the corporate structure of the company as was considered in many of the cases to which I have referred. I therefore come to the conclusion that the answer to the third question is that the sum received by the trustee upon redemption of the shares referred to therein is corpus of the estate.

That brings me to deal with the first two dividends. Here the directors were seeking to do two things—(1) to take advantage of the powers conferred under The Income Tax Act to place in the hands of the shareholders the earned surplus so that it would reach them in an untaxable form; and (2) to reduce the earned surplus to nil or a debit balance so that the capital surplus might be released for distribution in some form without attracting taxation.

Much argument was addressed to me with reference to the provisions of The Income Tax Act and their effect. It is not necessary for me to point out that no provision of a Dominion statute could affect the rights as between life tenant and remainderman (unless some action taken under emergency powers), with respect to shares in a company incorporated under the laws of a Province. I am refraining from entering upon any discussion with reference to shares held in a company incorporated under Dominion laws. Whether the provisions of the two Dominion statutes may in any way be read together is not for me to discuss in this case. The matter before me is to be determined by provincial law and provincial law alone. It may be that if one is permitted to go behind the corporate acts for the purpose of determining the motive of those responsible for the corporate acts, the provisions of The Income Tax Act have some relevance, but no provision in it as to what



is to be deemed "capital" or "income" has any bearing on the rights of the parties in this case.

With reference to the shares referred to in questions 1 and 2 the corporate steps taken were precisely the same. Acting under the provisions of s. 96 of the Ontario Act, a stock dividend was declared and shares were issued as *fully-paid-up* shares. In order to do this the funds from the surplus account must necessarily have been appropriated to the capital account and credited on these shares. When this was done, the trustee was made the holder of fully-paid shares in the company and the certificates issued were evidence of that interest. There was not the lapse of time during which circumstances might have changed making it impossible for the directors to carry out their plan of redeeming the shares. But I cannot see how the fact that the share-certificate was accompanied by the notice of redemption and the cheque alters the corporate character of the transaction. "The form of a company's resolutions and instruments is their substance." In this case the form and substance was that the trustee was made the holder of fully-paid-up shares as soon as they were issued. That being true, the company had, by its acts, concluded the question whether the shares were in fact and in law corpus or income. The fund against which the shares were issued as fully-paid-up shares could not thereafter be by judicial decision recast into distributable profits. In every case in British jurisprudence which I have been able to find, except *Re Fleck* and *Re Mills*, which I regard as decisions not binding on me, where shares have been issued as against accumulated profits it has been held that they were capital and not income. The *Barton* case, the *Blott* case and the *Fisher* case are all clear examples. On the other hand, I do not think that the argument which revolved around the question whether distribution of profits in another form has been capital or income, depending on the declaration by the company of "intention" or "the substance" of the transaction, as in the *Sproule* case and the *Bates* case, advances the case of the life tenants. On the facts of the case before me I find that the company, by the issue of the preferred shares, determined the answer to both questions 1 and 2 and my conclusion is that the sums received by the trustee referred to therein are part of the corpus of the estate.

The costs of all parties will be out of the estate, those of the executor on a solicitor-and-client basis.

I may add that this is a matter of very great importance, not only in the administration of estates but in the drafting of wills, and it is to be hoped that the law to be applied in all its aspects will be settled with finality and clarity at an early date by the highest Court in Canada.

*Judgment accordingly.*

*Solicitor for the executor and trustee, applicant: Alan L. Ambrose, Hamilton.*

*Solicitor for Phyllis Vallance and Roger McIntyre: D. J. Dore, Hamilton.*

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[McRUER C.J.H.C.]

**Re Ross and Board of Commissioners of Police  
for the City of Toronto.**

*Police — Powers and Duties of Police Commissioners — Appeal from Board's Refusal of Licence—Proper Order if Appeal Allowed—Duty of Board and its Members to Comply with Order—Proceedings for Contempt—The Municipal Act, R.S.O. 1950, c. 243, s. 263—Rule 555.*

Section 263(7) of The Municipal Act gives to a person who has been refused a licence by a board of police commissioners a right to appeal to a Supreme Court judge, but nowhere is the appellate judge given power to grant the licence, or to make the order that should have been made by the board. It is therefore wholly proper, if the judge hearing the appeal is of the opinion that the appellant should have a licence, for him to make an order referring the matter back to the board and directing the board to issue a licence forthwith. Such an order is not an order of mandamus in the ordinary sense, and it is therefore immaterial whether the board is a suable entity or not. It is the board, and not the members of the board, that has power to grant a licence, but under Rule 555 it is the duty of the members of the board, when the order comes to their notice, to observe it scrupulously and to issue the licence at once.

*Contempt of Court—Non-compliance with Order—Order Complied with after Launching of Motion to Commit—Costs of Motion.*

A board of police commissioners failed to act in accordance with an order of the Supreme Court directing it to issue a licence to an applicant, and the applicant thereupon moved to commit two members of the board for contempt of Court. After the motion had been partly argued the board met and granted a licence, and the motion to commit was thereupon abandoned, reserving the question of costs to be disposed of by the Court.

*Held*, in the circumstances the applicant was entitled to his costs against the respondents on a solicitor-and-client basis. *Re West Nissouri Continuation School* (1917), 38 O.L.R. 478, applied. It might be that the commissioners acted, on legal advice, in accordance with what they thought to be their duty, and that the board should indemnify them against the costs, but the Court had nothing to do with that question.

TWO MOTIONS, argued together, both arising out of the judgment of LeBel J., *ante*, p. 556, [1953] 3 D.L.R. 597.

29th and 30th October 1953. The motions were heard by McRUER C.J.H.C. in Weekly Court at Toronto.

*R. N. Starr, Q.C.*, for Thomas A. Ross.

*Gordon N. Shaver, Q.C.*, and *W. R. Callow*, for the Board of Commissioners of Police for the City of Toronto, and for the respondents on the motion to commit.

30th October 1953. McRUER C.J.H.C. (orally):—There are two motions before me for disposition. The first motion is one made by Mr. Starr on behalf of Thomas A. Ross, "for an Order directing a Writ of Attachment to the persons of Allan Lamport, Mayor of the City of Toronto, and His Honour Judge T. H. Barton,



being two members of the Board of Police Commissioners for the City of Toronto, for contempt of the Order of the Honourable Mr. Justice LeBel dated the 20th day of May, 1953, upon the ground that the said Commissioners have wilfully disobeyed the Order . . . or in the alternative for an Order committing the said Commissioners" to gaol for contempt of the order. The other motion is brought by Mr. Shaver under Rule 523 to reverse, vary or suspend the operation of the order of Mr. Justice LeBel upon the grounds that:

"1. The said Board of Commissioners of Police is not a suable entity and therefore has not the capacity to sue or be sued.

"2. The said Board of Commissioners of Police was not created a corporation by any statute and is not a legal person. Consequently, it should not have been a party to these proceedings and any Order made against it is a nullity.

"3. The learned Judge did not have jurisdiction, power or authority to make a mandatory Order directing The Board of Commissioners of Police for the City of Toronto to issue an independent cab owner's licence to Thomas A. Ross, for the following reasons: [and the reasons are set out].

"4. The learned Judge had no power or authority to make an Order directing the said Board to pay the appellant his costs of the appeal for the following reasons: [and the reasons are set out]."

Rule 523 reads as follows: "A party entitled to maintain an action for the reversal or variation of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, or to any further or other relief than that originally awarded may move in the action for the relief claimed."

On the 20th May 1953 my brother LeBel gave judgment in an appeal that had been heard by him at an earlier date from the refusal of the Board of Commissioners of Police of the City of Toronto to issue a licence to Thomas A. Ross to drive a taxicab in the city of Toronto, as an independent cab-owner, *ante*, p. 556, [1953] 3 D.L.R. 597. The formal judgment was taken out on the 4th June 1953, and reads as follows:

"1. IT IS ORDERED that this Appeal be and the same is hereby allowed.

"2. IT IS HEREBY ORDERED that the application of Thomas A. Ross herein be and the same is hereby referred back to the Board of Police Commissioners of the City of Toronto, but only to enable the Board to issue an independent cab owner's license to Thomas A. Ross.

"3. IT IS FURTHER ORDERED that the Board issue an independent cab owner's license to Thomas A. Ross forthwith.

"4. IT IS FURTHER ORDERED that the Respondent do pay to the Applicant his costs of this Appeal forthwith upon taxation."

In hearing this appeal Mr. Justice LeBel was acting under s. 263 of The Municipal Act, R.S.O. 1950, c. 243. Under subs. 4 of that section the board of commissioners of police is given power to grant or refuse the licence applied for. The subsection reads in part: "... and it shall not be bound to give any reason for refusing or revoking a licence and its action shall not be open to question or review by any court."

However, subs. 7 provides: "Notwithstanding subsection 4 the decision of a board of commissioners of police in refusing or revoking a licence shall be subject to an appeal therefrom to a judge of the Supreme Court whose decision shall be final."

Much argument was addressed to me in this case as to whether para. 3 of the formal order was an order within the jurisdiction of my brother LeBel. It was contended that a mandamus could not be issued against a board of commissioners of police because the Board is not a legal entity. Whether an order for a mandamus in the ordinary sense may be directed against a board of commissioners of police is not a question that arises in this application as I see it. Even if it did, I doubt my power to set the order aside. I think the proper course would have been to appeal against it for want of jurisdiction. The provision of the statute which makes the decision of the judge final applies only to orders he is empowered to make.

An applicant for a licence is given a right of appeal from the board of commissioners of police in refusing the licence and the right given is to appeal to a judge of the Supreme Court. Therefore, when the matter comes before the Supreme Court, the judge has to adjudicate on the question whether a licence ought to be granted or not, and how that jurisdiction is to be exercised is not for me to say. It is sufficient to say that unquestionably Mr. Justice LeBel was clothed with jurisdiction to hear the appeal. It is not argued that he was not clothed with

such jurisdiction, and that he could not decide that Ross should be granted a licence. What follows from that is then merely procedural.

Subsection 8 of s. 263 provides that: "The practice and procedure on and in relation to an appeal made under subsection 7 shall be the same, as nearly as may be, as in the case of an appeal from a decision of the Master of the Supreme Court in an action or proceeding in the Supreme Court."

The statute does not provide that the judge shall thereupon grant the licence. It provides for an appeal to the judge, and it seems to me that Mr. Justice LeBel followed a very proper practice that should be observed where a right of appeal is given but no jurisdiction is conferred on the appellate judge to do the act that ought to have been done by the inferior tribunal. He referred the matter back to the board of commissioners of police to enable the Board to issue an independent cab-owner's licence, with a direction that the Board issue a licence forthwith.

In many cases where in proceedings in the Supreme Court an appeal is taken from the Master to a judge of the Supreme Court he refers the matter back to the Master with a direction that the Master do thus and so to carry out the judgment of the appellate judge. As far as I can see, the order of Mr. Justice LeBel was not a mandamus in the sense in which that word is used where a Supreme Court judge is exercising the jurisdiction, inherent or statutory, that a judge exercises in granting a mandatory order. He was merely exercising his appellate jurisdiction and giving effect to it through the administrative tribunal that was the only tribunal that had power to grant licences, and if that view is taken the Act is a workable Act and it has some meaning. If the view is taken that although the appellate judge can hear the appeal and decide that a licence should be issued, nevertheless he has no power to direct anyone to grant the licence, the right of appeal is meaningless.

During the argument I thought that it might be that the appellate judge had power to hear the appeal and direct the Chief Constable, under By-law 214 of the Board, to issue the licence, but on an examination of the statute and an examination of that by-law, I have come to the conclusion that the Board is the only tribunal that has jurisdiction to grant the licence and that the duty of the Chief Constable as set out in s. 2(1) (e) of the by-law "to cause to be made out all licences and to





To this Mr. Angus, the city solicitor, replied, acknowledging the letter and saying: "I do not wish to approve of this order as I do not think it is a proper disposition of the case. Nevertheless the order as drafted by you appears to be the order made by the Judge, and if you wish to issue it in this form, I do not see how I could object."

Well, with all due respect, whether Mr. Angus thought it was a proper disposition of the case or not was beside the point. It had been the disposition of the case. On the 8th June Mr. Starr wrote to Mr. McCubbin, the secretary of the board of commissioners of police, as follows:

"I enclose copy of the Order of Mr. Justice LeBel herein as issued.

"Would you please let me know as soon as possible whether the Board will issue a license to Ross, or whether it is contemplating further proceedings.

"If the latter instance is the case, I think it would be wise if you took some sort of steps to prevent my taking proceedings under the Order to enforce the Order."

It is said that at that time two of the members of the board of commissioners of police were abroad and one must make allowance for that. On the 9th June Mr. McCubbin wrote:

"I have your letter of the eighth instant enclosing a copy of the order of Mr. Justice LeBel.

"Mr. Johnston of the City Solicitor's office who has been handling this case is at present absent through illness, and I would be greatly obliged if you would let matters stand until his return and report to the Board on the case."

Then on the 12th June Mr. Angus, the city solicitor, wrote to Sinclair, Goodenough, Higginbottom and McDonnell, "re Ross and Board of Police Commissioners", and stated that Mr. McCubbin, the secretary of the Board, had shown him his letter enclosing the copy of Mr. Justice LeBel's order and he went on to say:

"There has been some unfortunate delay owing to the facts that Mr. Johnston of this office was away ill for some time and the Board have been disorganized owing to two of the members going abroad. I have now written a letter to the Board reporting the decision and giving the Board my views.

"It is possible that the Board may be taking some proceedings against the order of Mr. Justice LeBel. I have not

recommended that this be done but have merely left the matter with the Board. However I think we are both aware that the Board feel strongly in the matter and seem to be quite opposed to Mr. Ross's application. I shall likely be able to advise you further in the near future. Without instructions from the Board, I cannot, of course, take any proceedings to prevent your further action but I would suggest that unless you see your way completely clear, you allow matters to stand until the Police Board have given me instructions."

Again, with respect, it would seem to me it was not then for the Board to "feel very strongly in the matter" and to be "quite opposed to Mr. Ross's application", because Mr. Justice LeBel had made a judicial disposition of the matter and it was no longer open to the board of commissioners of police to be opposed to Mr. Ross's application.

Mr. Starr wrote on 15th June: "Unless the Board can make up its mind within a few days after the return of the Mayor, I am afraid it will compel me to move to enforce the Order of Mr. Justice LeBel." At the same time he wrote a letter to Mr. McCubbin enclosing a copy of that letter which had been addressed to Mr. Johnston.

In the same letter Mr. Starr replied to the letter of the 12th, stating that he would wait a reasonable time so far "as you personally are concerned. I wish however, to point out that the Order has been standing for some time, and it of course is not right that my client be delayed much longer."

Then followed the notice of motion to commit, which was served on the 25th June. This matter was returnable on the 8th July and by agreement of counsel was allowed to stand until after long vacation, and the notice of motion on which Mr. Shaver appears on behalf of the Board was served on the 5th October 1953. The parties then agreed that the matter should stand for the convenience of counsel and it came on to be heard before me yesterday. After argument before me yesterday, the board of commissioners of police held a meeting this morning and I am advised by counsel appearing on behalf of the Board that an independent cab-owner's licence was granted by the Board to Thomas A. Ross this morning before the opening of Court. That being done, Mr. Starr agrees that the formal order of Mr. Justice LeBel be amended on consent by striking out para. 3. Therefore, acceding to the arrangement between



counsel, I make an order, on consent, that Mr. Justice LeBel's order of the 20th May 1953 be amended by striking out para. 3 thereof. In doing so, I do not wish it to be taken in any way that I am criticizing Mr. Justice LeBel's order; as I have said, I thought his order was a very proper one. It might be that the phraseology of the formal order could be improved in such a case but with that Mr. Justice LeBel had nothing to do.

That left only the question of the committal order to be disposed of and the question of costs in the application made on behalf of the Board and in the application made for the committal order. It was agreed between counsel that, the licence having been granted, the motion made on behalf of the Board would not be proceeded with further, and that the motion to commit the mayor and Judge Barton would not be proceeded with further, but that the question of costs in both motions should be left to me to decide. These motions were argued together and I think there should be only one counsel fee with respect to the two motions.

I think Mr. Ross should have his costs of the motion on behalf of the Board to set aside Mr. Justice LeBel's order. Mr. Shaver raises no question as to my power to make an order that the motion be dismissed with costs to be paid by the board of commissioners of police. The order that I make is that the counsel fee with respect to the motions be borne in that motion.

Now dealing with the costs of Mr. Starr's motion: I can see no good reason why the applicant should be deprived of his costs in launching this motion to commit. The licence having been granted only after the motion was launched, following the precedent set by Mr. Justice Middleton in *Re West Nissouri Continuation School* (1917), 38 O.L.R. 478, I award these costs on a solicitor-and-client basis, but to include no counsel fee. Mr. Shaver has suggested that these costs be all allocated against the Board. I do not see how I can do that. That may be a matter of arrangement for decision of the Board. It may very well be that the mayor and Judge Barton, acting on legal advice, have performed their duties as they thought they should be performed, and that the Board should indemnify them against the costs. With that I have nothing to do.

The order will therefore be that the motion for committal will be dismissed on consent, and the costs will be paid on a solicitor-and-client basis down to the hearing of the motion by

the respondents. The motion to rescind or vary Mr. Justice LeBel's order, except as it is varied by consent, will be dismissed with costs to be payable by the Board on a party-and-party basis, the whole of the counsel fee of the proceedings before me yesterday and to-day to be borne in that motion. On consent, the order of Mr. Justice LeBel will be varied by striking out para. 3.

*Order accordingly.*

*Solicitors for Thomas A. Ross: Sinclair, Goodenough, Higginbottom & McDonnell, Toronto.*

*Solicitor for the Board: W. G. Angus, Toronto.*

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[COURT OF APPEAL.]

Regina v. Denberg.

*Husband and Wife—Summary Proceedings for Maintenance—Composite Nature of Maintenance Order—Implied Findings—Limited Nature of Right to Rehearing—Necessity for Fresh Evidence—Admissibility of Evidence on Rehearing—Earning Capacity of Wife—The Deserted Wives' and Children's Maintenance Act, R.S.O. 1950, c. 102, ss. 1(1), 6(1), (2).*

An order for maintenance under The Deserted Wives' and Children's Maintenance Act is a composite one, although its nature is not clearly shown in the form suggested in the schedule to the Act. A recital in the order "that the said [wife] is entitled to the benefit of the said Act" is precisely the same in effect as if the order set out, in successive paragraphs, findings that the husband had deserted the wife, that he had not made adequate provision for her maintenance, that he was able to maintain her in whole or in part, and that he neglected or refused to do so, these being conditions set out in s. 1 of the Act to entitle a wife to a maintenance order.

The right to a rehearing under s. 6 of the Act is dependent upon either a change in circumstances or the availability of evidence not available on the original hearing. Without "fresh evidence" of this kind a wife who has failed to establish desertion under the Act cannot successfully seek to have the matter reheard and the order rescinded, nor, if an order establishing desertion has been made, can she seek, without "fresh evidence", to have the amount of maintenance varied. Similarly, the husband cannot apply for a rehearing for the purpose of having the order rescinded or varied solely on evidence that was available to him at the original hearing. The situation is the same, in respect of the evidence that may be tendered by the husband, where the application for a rehearing is made by the wife, and he cannot resist the wife's application for an increase in maintenance, based upon evidence of a change in her circumstances, by adducing evidence to the same effect as that originally heard as to the original desertion or matters antedating it. His only recourse, if he wishes to have the original order rescinded on the ground that he has not deserted his wife, is himself to apply for a rehearing, if he has "fresh evidence" of the nature indicated. *Underwood v. Underwood*, [1947] P. 84, quoted and applied; *Thompson v. Thompson* (1934), 78 Sol. Jo. 820, discussed.

Since s. 1(1) of the Act directs a magistrate to have "regard to all the circumstances", evidence as to the earning capacity of a wife is admissible on a proceeding to fix or vary the amount of maintenance to be paid by her husband. The reasoning in *Hall v. Hall*, [1947] O.R. 6 at 10, affirmed [1947] O.W.N. 503, is applicable to the determination of the amount of maintenance to be ordered under the Act.

AN APPEAL from a judgment of Currey Co. Ct. J., in the County Court of the County of York, dismissing an appeal from a maintenance order made by a magistrate.

7th and 8th October 1953. The appeal was heard by LAIDLAW, ROACH and AYLESWORTH JJ.A.

D. S. Denberg, appellant, in person: The trial judge was wrong in not permitting me to lead evidence to show that the original order for maintenance should not have been made. Not only was the respondent's conduct before the separation (and in particular her cruelty, which was the cause of that separation) relevant as showing that she had disentitled herself to an order for maintenance, but it was also an important factor in determining the amount of maintenance, if she was entitled to any: *Thompson v. Thompson* (1934), 78 Sol. Jo. 820; *Ginter v. Ginter*, [1953] O.R. 688; *Wiles v. Wiles* (1913), 13 O.W.N. 359.

Section 1(1) of The Deserted Wives' and Children's Maintenance Act, R.S.O. 1950, c. 102, requires the magistrate to consider "all the circumstances", and this requires him to consider the conduct of the parties before the separation. "Desertion" within the meaning of s. 1(2) is clearly dependent upon a great many circumstances antedating the separation of the parties. A "rehearing" under s. 6 involves a reopening of the case and is the same as a retrial. The County Court Judge had the power to hear the case.

A wife, having obtained an order for maintenance, is not entitled to leave her employment without sufficient cause and rely upon her being no longer employed as a change in circumstances within the meaning of s. 6. The respondent's hospitalization and her needs in respect of the child were before the Court in the original proceedings and the appeals therefrom, and were therefore not a change in circumstances on the rehearing.

In view of the evidence as to my estate and income there was no justification for increasing the amount of maintenance to be paid.

Evidence as to the respondent's earning capacity was improperly excluded by the trial judge. A wife who is able to earn



money is not entitled to make no effort to do so, and require her husband to maintain her. If her earning capacity is greater than his, he has no duty to support her.

*S. Gebirtig, Q.C.*, for the respondent: In the original proceedings, which went as far as this Court, it was held that there had been desertion and that the wife was entitled to maintenance in the amount of \$10 a week in the circumstances that then existed. The question of desertion was thus determined against the appellant in three Courts, and the whole matter cannot now be gone into a second time. [AYLESWORTH J.A.: The appellant's submission is that on your client's application for a rehearing the magistrate must hear and weigh all the circumstances relevant to and bearing on the question of quantum, including matters as to the wife's conduct.] All the evidence bearing on quantum was gone into, and a consideration of my client's conduct before the making of the original order would amount to a reconsideration of that order. The matter of desertion is *res judicata*. [LAIDLAW J.A.: The statute provides for a "rehearing"; does that not contemplate a complete review of the whole matter?] Only, I submit, as to matters that have happened since the making of the original order for maintenance. I refer to *Underwood v. Underwood*, [1946] P. 84, [1945] 2 All E.R. 561. [ROACH J.A.: You clearly cannot bring in merely evidence of something before the original application, and stop there. But can you not bring in that evidence, supplemented by evidence of matters subsequent to the making of the order, so that the magistrate can consider the whole position?] [LAIDLAW J.A.: Is not a husband entitled on such an application to show, by evidence relating to the whole of his married life, that the wife is not entitled to an increase in maintenance?] The only purpose to be served by the introduction of evidence of previous conduct would be to show that the wife was not originally entitled to an order for maintenance, and that matter had already been determined, and had become *res judicata*. The appellant's contention would mean that if a wife obtained an order for maintenance the husband could have the whole matter gone into again and again, and in every case a notice of appeal would stop the payments.

There were substantial reasons shown for increasing the award. The Act does not say that a husband need not support his wife if her earning capacity is greater than his. It expressly creates a liability to support her if he has deserted her.

D. S. Denberg, in reply: If the respondent intended to argue *res judicata* she should have filed the record in the original proceedings. Of course there is a statutory duty to support, but it is limited and conditional, and all the circumstances must be taken into consideration.

*Cur. adv. vult.*

2nd November 1953. The judgment of the Court was delivered by

AYLESWORTH J.A.: This is an appeal from an order of His Honour Judge Currey sitting in the County Court of the County of York and dated 1st May 1953, which dismissed appellant's appeal from an order pronounced by Magistrate Grudeff in the Toronto Family Court on 23rd February 1953 under The Deserted Wives' and Children's Maintenance Act, R.S.O. 1950, c. 102, directing appellant to pay \$17 per week to his wife for her maintenance. By s. 9 of the said Act, proceedings under that statute are in accordance with The Summary Convictions Act, R.S.O. 1950, c. 379. Section 12 of the latter Act permitted the appellant to appeal to the County Court and, since s. 3 of the same Act directs that Part XV of The Criminal Code, R.S.C. 1927, c. 36, shall be applicable to the case, the hearing before His Honour Judge Currey was in the nature of a trial *de novo* and appellant under s. 769A of Part XV, as enacted by 1947-48, c. 39, s. 34, may appeal to this Court by leave on any ground which involves a question of law alone. The appellant raises two questions of law and argument upon those questions was permitted to proceed, subject, of course, to the requisite leave being given. I think such leave should be given as the questions raised are of general importance concerning the interpretation of The Deserted Wives' and Children's Maintenance Act and the admissibility or inadmissibility of certain evidence on a rehearing under that Act.

A short recital of the history of the litigation between the appellant and his wife as to maintenance for the wife is essential to a proper understanding of the questions to be considered.

On 11th June 1951, and upon the wife's application, a magistrate's order was made directing appellant to pay to his wife for her maintenance the sum of \$24 weekly. This order was varied on appeal to the County Court by reducing the amount so payable to the sum of \$18 weekly and, upon further appeal to this

Court, was by order of this Court dated 5th June 1952 further varied by reducing the amount so payable to the sum of \$10 weekly. At the hearing before the County Court in the former proceedings it was disclosed in evidence that the wife at that time was earning approximately \$160 a month; on the appeal to this Court in the original proceedings counsel for the wife stated to the Court that the wife at that time was in the hospital undergoing a surgical operation but no clear indication could then be given as to the duration of her illness or the effect thereof upon her future earnings. On 11th February 1953 the wife applied for "a rehearing of my case with a view to an increase in the amount of the said order" alleging that her "circumstances have changed since the making of the order in that I am no longer gainfully employed because of ill health and increased responsibility for the care and maintenance of our son David". David is nine years of age. Pursuant to this application both parties appeared before Magistrate Grudeff in the Toronto Family Court, only the wife giving any evidence. On the appellant's appeal heard before His Honour Judge Currey, the wife again testified and appellant gave evidence on his own behalf. Appellant then stated that he also desired to call a doctor to give evidence on his behalf but that, although he had had the doctor in attendance, he was not available when appellant was ready to call him. Appellant did not state the nature of the intended evidence except to submit that it would have "a vital effect" on the wife's allegation of a change in her circumstances. Appellant admitted that the doctor, whose name was not given, was not under subpoena, and in the circumstances, including the circumstance that a special date had been given for the conclusion of the hearing before him, the County Court Judge refused further to adjourn the proceedings. In this Court appellant sought to protest against this ruling, but in my view the limited nature of appellant's appeal does not leave that protest open to him and, in any event, I think the County Court Judge's ruling was entirely proper.

The first question of law with which we have to deal arises from the refusal of the Court below to permit the appellant to adduce evidence of the wife's conduct before the date upon which the spouses commenced to live apart from one another. Appellant stated to the County Court Judge that he sought to have "the order [that is, the original order as amended in the original pro-



ceedings] rescinded". His submission in this Court is that upon the rehearing at the wife's instance and upon the appeal before the County Court Judge from that rehearing he was entitled, by way of defence, to reproduce before the Court, completely untrammelled by the result of the original proceedings, evidence solely upon the identical matters of the wife's conduct originally relied upon by him and adjudicated upon in the original proceedings; that is to say, that he is entitled to a complete re-adjudication. Alternatively, he submits that, if he is not thus permitted a re-adjudication upon the question of desertion, he may re-introduce such evidence directed to the question of quantum.

Subsections 1 and 2 of s. 6 of The Deserted Wives' and Children's Maintenance Act now read:

"(1) Where a judge is satisfied that,

"(a) the circumstances of any of the parties have changed since the making of an order; or

"(b) evidence has become available which was not available upon the previous hearing,  
he may direct a rehearing of the application.

"(2) Upon the rehearing of the application any order previously made may be confirmed, rescinded or varied."

It is plain that a condition precedent to the granting of a rehearing is proof of the facts falling within either para. *a* or para. *b*. It is equally plain that appellant's complaint concerning the exclusion of evidence in the Court below cannot be supported on the ground that the excluded evidence falls within either of these paragraphs. Without "fresh evidence" of the nature outlined in *a* or *b*, a wife who had failed previously to establish under the Act a charge of desertion against her husband could not seek successfully to have the matter reheard and the order rescinded; likewise, if an order establishing desertion had previously been made in her favour, a wife could not successfully seek a rehearing in order to have the amount of maintenance varied. To carry the matter one step further, the appellant himself could not have applied successfully for a rehearing for the purpose of having the order rescinded or varied upon the evidence which the County Court Judge excluded.

Is the situation then any different when the appellant is not himself the applicant for a rehearing but appears in answer to such an application by the wife? I think not. I think the com-

posite nature of an order made under the Act is a factor which the appellant has overlooked and that in overlooking it he has misunderstood the real scope of the proceedings for a rehearing as instituted by the wife.

Section 1 of the Act makes it clear that an applicant wife must establish several things before becoming entitled to the benefit of the statute. She must establish that her husband has deserted her, that he has not made adequate provision for her maintenance, that he is able to maintain her in whole or in part and that he neglects or refuses to do so. All of these matters originally require adjudication and an order directing payment of maintenance to the wife is such an adjudication in her favour upon all of them. The true nature of the order is perhaps not indicated as clearly as it might be in the suggested form or order appearing in the schedule to the Act, in which suggested form, in the place of specific findings upon the matters required to be proved by the wife, appears the following recital "it appearing that the said [wife] is entitled to the benefit of the said Act". The effect, however, remains precisely as though an order in several successive paragraphs set out findings upon all the matters mentioned in s. 1.

In the instant application by the wife a rehearing was requested upon only one of the matters covered by the original order, namely, the quantum of maintenance. That matter, and that matter alone, was before Magistrate Grudeff and in appeal before His Honour Judge Currey. If appellant was desirous of having the original order rescinded by establishing that he had not deserted his wife either in fact or in law, it was open to him to apply for a rehearing for that purpose, always supposing that he had "fresh evidence" of the nature indicated.

Appellant relied upon the case of *Thompson v. Thompson* (1934), 78 Sol. Jo. 820. That was a decision of the Probate Division of the High Court of Justice, Sir Boyd Merriman (as he then was) presiding. Under s. 7 of The Summary Jurisdiction (Married Women) Act, 1895, c. 39, a husband there applied for an order varying an original order made against him for payment of maintenance by reducing the amount so payable. On appeal from the justices who heard the application to vary, it was held "that the contention that the evidence must be confined to circumstances which had taken place since the date of the original

order was erroneous and the case must be remitted to the justices to consider the whole of the facts”.

The case is reported so tersely as to be quite unsatisfactory as an authority for any of the purposes of our own statute. On the contrary. I find helpful authority, cogent as well as relevant, in the later case of *Underwood v. Underwood*, [1946] P. 84, [1945] 2 All E.R. 561. Before the commencement of proceedings in the *Underwood* case, the English Act had been so amended as to remove the former requirements of the statute concerning “fresh evidence” where the issue to be determined on the rehearing was confined to variation in the amount of the maintenance directed by the original order. Before the amendment, the Act of 1895 by s. 7 thereof declared that where an order had been made the Court “may, on the application of the married woman or of her husband, and on cause being shown on fresh evidence to the satisfaction of the court at any time, alter, vary or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made”.

This enactment had been so interpreted that not merely the power to alter, vary or discharge the order was conditioned by the express words that it must be on fresh evidence, but also the same restriction as to fresh evidence conditioned the power to increase or diminish the amount of any weekly payments.

By amendment in 1935, it was enacted that: “. . . fresh evidence shall not be required as a condition of the exercise of the power conferred . . . by s. 7 of The Summary Jurisdiction (Married Women) Act, 1895, to increase or diminish the amount of weekly payment.”

In the *Underwood* case, a husband, who had resisted an original order under the Act on the ground of his wife’s adultery, applied to vary the amount payable by him under that order and produced in support of his application the same evidence or evidence of the identical facts upon which he had originally relied. He was precluded from seeking to discharge the order except upon fresh evidence, but because of the amendment in the statute dispensing with the requirement of fresh evidence on an application merely to vary the order he endeavoured without fresh evidence to have the amount of the payment reduced to a nominal sum. I quote from the judgment on appeal of Lord Merriman P., at p. 89:



“ . . . I am not prepared to say that, speaking generally, evidence of the conduct of the party attacked, whether before or after making of the order, is necessarily to be excluded. I think it may be very relevant on the question of amount . . . Having said that, I feel very strongly that a mere repetition of the identical evidence, or evidence of identical conduct, which was received before the order was originally made, and must necessarily have had its bearing not merely on the finding of desertion but on the amount to be awarded, cannot be put forward at a later date as cause for varying the amount . . . The view that I take of this matter is simply this, that when evidence has been produced on which a certain result has been arrived at both on the merits and on the money, it is not open to the party to produce the same evidence again as cause for varying the amount of the monetary award.”

Wallington J., the other member of the Court, has this to say upon the same point, at p. 91: “With regard to this case, I agree with my Lord that the magistrate was perfectly right in holding that inasmuch as on the original application the issue raised by the husband by way of defence was, ‘My wife has committed adultery,’ and on the application to discharge or vary the order the husband’s case was, ‘My wife has committed adultery,’ evidence available at the date of the earlier hearing that the wife had committed adultery would not be fresh evidence within the meaning of those words as they have been interpreted by the court in so many cases. With regard to the order that he made diminishing the amount of the payment, the question is whether there was cause shown for that order. It seems to me that to say: The original order was made despite a defence of adultery by the wife, but proof by the husband of what he failed to establish when the order was originally made will constitute ‘cause shown to the satisfaction of the court’ is incorrect. In my opinion that cannot be cause shown to the satisfaction of the court.”

Although there are not inconsiderable differences between the English statute and our own, I think that upon principle the reasoning of the learned judges in the *Underwood* case, as illustrated by the passages from their judgments which I have quoted, applies in the interpretation of The Deserted Wives’ and Children’s Maintenance Act, and my conclusion therefore is that His Honour Judge Currey properly excluded the evidence which

appellant sought to introduce. It is important to emphasize that we are here dealing with a case where the appellant had no fresh evidence as contemplated by our statute and therefore had brought no application either to rescind or to vary. We are not called upon to deal, and I am not to be taken as dealing, with a situation where "fresh evidence" as to the conduct of the wife is available, and in addition to that evidence a review is sought of the whole of the conduct of the wife; such a situation would involve considerations not here present and will remain to be dealt with as and when it arises.

The other question of law raised by the appellant is that the Court below erroneously refused to consider evidence of the earning capacity of the wife and that such evidence was properly receivable as bearing upon the quantum of the allowance. I think the appellant is correct in his contention and that evidence of earning capacity was properly receivable. So far as The Deserted Wives' and Children's Maintenance Act is concerned, I adopt the reasoning of LeBel J. in *Hall v. Hall*, [1947] O.R. 6, [1947] 3 D.L.R. 453, affirmed [1947] O.W.N. 503, [1947] 3 D.L.R. 458, wherein after reviewing the authorities with respect to the amount of alimony he sums up his opinion, at p. 10 as follows:

"I am of the opinion that the amount of alimony is in the discretion of the Court, a discretion to be exercised judicially according to established principles and upon an equitable view of all the circumstances of the case (see *Malcolm v. Malcolm* (1919), 46 O.L.R. 198, affirmed 46 O.L.R. 609), and I am satisfied that nothing precludes a Court, in a proper case, from considering as a circumstance a wife's earning capacity or her salary, in arriving at a proper allowance. I think that this is such a case."

It is true that the decision of LeBel J. had to do with alimony, that alimony is not here in question, and that the opinion of the learned judge upon that question is not here in review nor do I attempt to review it. I simply say that the principles upon which his reasoning was based, in my opinion, are applicable to the determination of the amount of maintenance under the Act with which we are now dealing, and this I think is made clear by the direction in s. 1(1) of the Act, which says that "the magistrate may order him to pay such sum at such intervals as may be deemed proper, *having regard to all the circumstances*". (The italics are my own.)

Nevertheless, in my opinion the appellant is not entitled to succeed in this appeal by reason of the failure in the Court below to consider the wife's earning capacity. It is quite clear from the record that the wife before her illness and operation was able to earn an approximate \$160 a month. It is equally clear, however, from the wife's testimony that she ceased work because of ill-health, that she is still under the doctor's care as the result of an operation and that she is at present unable to resume work. It is also clear that there is no one available in the wife's residence to take care of the son David except the wife herself and that the child, if the mother were able to work, would be left unattended for two hours during each school day. If, as and when the wife is able to resume work, her net earnings probably will be affected by the necessity to provide care or supervision for the child during her absence in employment. The wife's evidence as to her state of health and as to the necessity for caring for the child is uncontradicted. For these reasons, upon a consideration of all of the evidence as to the earning capacity of the wife which was before the Court below, I can see no reason for disturbing the amount of maintenance which the appellant has been directed to pay.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitor for the respondent: Sol. Gebirtig, Toronto.*

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## [COURT OF APPEAL.]

**Canada Permanent Mortgage Corporation v. The City of Toronto.**

*Municipal Corporations — Borrowing Powers — Issue of Debentures — Variation in Terms by Letter under Corporate Seal — Validity of Variation — The Municipal Act, R.S.O. 1950, c. 243, s. 334 — An Act respecting the City of Toronto, 1910 (Ont.), c. 135, s. 6.*

*Debentures and Bonds — Variation in Terms of Debentures by Letter Under Corporate Seal — Power of Municipal Officer — Debenture Considered as Consisting of Certificate and Letter together.*

An enabling statute empowered the defendant to borrow money on debentures "payable at any place in Canada, Great Britain, the United States of America, or elsewhere, and . . . in sterling money of Great Britain or currency of Canada or the United States of America". Pursuant to this statute the defendant passed a by-law authorizing the issue of debentures to an amount of \$250,000 and providing that the mayor and treasurer should have authority to raise the money on the security of the debentures "either in currency or sterling money", and that the debentures should be "sealed with the seal of the said Corporation, and be signed by the Mayor and the Treasurer". The by-law further provided for the establishment of a sinking fund and the raising of the funds necessary for interest and sinking fund payments.

Debenture certificates were printed, expressed to be repayable in pounds sterling in London, totalling the equivalent in sterling of \$250,000 at the then rate of exchange (\$4.86½ to the pound). The bonds were dated in 1909 and payable in 1948.

Following the printing of the debentures, but before their sale, the city treasurer wrote two letters, both signed by him under the corporate seal of the defendant, in which he stated that the bonds would be payable in New York instead of London, and that payment would be made "at the par of exchange (9½%)". Thereafter, until 1940, interest on the debentures was paid in United States funds, calculated at the par rate of exchange, but after 1940 the funds were calculated at the current rate of exchange. The plaintiff, which had bought a block of the bonds, with a copy of the city treasurer's second letter, sued after maturity for the principal amount of the bonds calculated at the par rate of exchange, and for the deficiency in the interest paid since 1940.

*Held*, the plaintiff was entitled to succeed.

The alteration in the terms of the debentures in respect of the place of payment was made in accordance with the rules governing the alteration of contracts under seal, and was therefore valid and binding. The seal of the corporation was sufficient, although the mayor's signature was lacking, since delivery of the debentures had already taken place. *Town of Eastview v. Roman Catholic Episcopal Corporation of Ottawa* (1918), 44 O.L.R. 284, applied.

A "debenture" had been defined as a document that either created a debt or acknowledged it, and any document that fulfilled either of these conditions was a debenture. *Levy v. Abercorris Slate and Slab Company* (1887), 37 Ch. D. 260 at 263, applied. Extrinsic circumstances (which might be looked at to explain the ambiguity in the language of the amending letters) indicated that the intention of the parties was that the printed certificates should be amended not only in respect of the place of payment but also in respect of the manner of calculating the amount payable. The statute and by-law provided that the debentures might be payable in either "sterling money" or dollar currency, and the words "sterling money" meant the pound at its value in dollars at the rate of exchange on the day of payment. In ordinary circumstances the defendant would not have been entitled to make such an alteration in the debentures while they remained payable in "sterling money", since the effect would be to "peg" the rate of exchange.

But the intention, and the effect, of the letters was to undertake that the bonds would be paid in dollars, the amount of dollars to be ascertained by giving to each pound represented on the face of the bond certificate the value of \$4.86%.

Also, by s. 6 of An Act respecting the City of Toronto, 1910, the Legislature had expressly "validated and confirmed", *inter alia*, this by-law "and all debentures issued or to be issued thereunder", and the effect of this was to validate the debentures in their final form, consisting of the printed certificates and the amendments made to them.

Further, s. 334 of The Municipal Act provided that when interest had been paid for one year or more on debentures issued under a by-law and the principal of any matured debenture had been paid the by-law and all debentures issued under it should be "valid and binding upon the corporation". The interest due on all the debentures held by the plaintiff had been paid for more than one year. *Standard Life Assurance Corporation v. Tweed* (1903), 6 O.L.R. 653 at 655; *Wilson v. Corporation of Delta*, [1913] A.C. 181 at 188, quoted and applied. Judgment of LeBEL J., *ante*, p. 81, reversed.

AN APPEAL by the plaintiff from the judgment of LeBel J., *ante*, p. 81, [1953] 1 D.L.R. 836, dismissing the action.

14th September 1953. The appeal was heard by HOPE, HOGG and F. G. MacKAY JJ.A.

*C. F. H. Carson, Q.C. (R. N. Starr, Q.C., and Allan Findlay, with him)*, for the plaintiff, appellant: Undoubtedly, as the learned trial judge held, the mayor and treasurer would have had authority, under The City of Toronto Debt Consolidation Act, 1889 (Ont.), c. 54, as amended, and By-law 5338, to instruct the printers to change the place of payment on the face of the debentures to New York, and they would also have had authority to instruct the printers to change the amount payable from a sum expressed in pounds sterling to one expressed in United States dollars, calculating the equivalent amount of the then par rate of exchange. The effect of the letters was similar to making these amendments, substituting New York as the place of payment, and "\$2,433.33 United States currency" for "£500 sterling".

The trial judge was wrong in his view that what the mayor and treasurer purported to do was to "peg" the value of the pound for purposes of redemption and interest. What the City did was to stipulate that payment would be made at New York instead of London. Having done this, it was only reasonable to provide that the payment should be made in United States dollars, and to define the number of dollars that would be paid. Clearly the City had power to issue debentures payable at New York in dollars, and to define the amount that would be paid in dollars.

The trial judge was of the opinion that the undertaking to pay in dollars was a very substantial one, but at the time the undertaking was given it was no more substantial than an undertaking to pay in sterling. Had there been a serious devaluation of the United States dollar the effect would have been beneficial to the City, and in 1911 there was no reason to expect a devaluation in the pound sterling rather than in the United States dollar.

The by-law authorized the issue of debentures to an amount of \$250,000 and the total amount of the debentures as originally printed was the sterling equivalent of this sum. Had all the debentures been made payable in United States dollars the total amount authorized by the by-law would not have been exceeded because the Canadian and United States dollar were then of equal value.

The fact that the undertaking to pay in United States dollars was contained in a letter rather than in a new certificate or an amendment of the original certificate can make no difference. At most, the fact that the undertaking was contained in such a letter would constitute an irregularity, curable under s. 9 of the 1889 statute.

In any event, these debentures were validated and confirmed by s. 6 of An Act respecting the City of Toronto, 1910 (Ont.), c. 135. This statute validated the debentures as issued in the terms set out in the letter of 9th December 1911. Moreover, interest on the debentures having been paid by the City for more than one year, they are valid and binding upon the City under s. 334 of The Municipal Act, now R.S.O. 1950, c. 243: *Standard Life Assurance Company v. Tweed* (1903), 6 O.L.R. 653.

*F. A. A. Campbell, Q.C.*, for the defendant, respondent: The City can act only by by-law, and while The City of Toronto Debt Consolidation Act, 1889, as amended, gave authority to pass By-law 5338, neither statute nor by-law authorized any alteration in the form of the debentures. While a minor change might be made by letter, the change that the city treasurer purported to make by letter was a major one, and not within the purview of the Act: *Smith v. Chadwick* (1882), 20 Ch. D. 27. If the letter gave any rights to the Stimson company (which is not admitted), those rights would be personal to that company, and could not extend to subsequent purchasers of the



debentures. There is no evidence that there was any assignment of these rights to the plaintiff: *Confederation Life Association v. Township of Howard* (1894), 25 O.R. 197 at 207.

In any event, the statute and the by-law authorized the mayor and the city treasurer to issue debentures, and this letter, without the mayor's signature, can have no effect. By-law 4295 is a direct prohibition against the treasurer using the corporate seal as he did.

The plaintiff, if it thought it was getting "three-way bonds", made a mistake of law, and cannot recover: *O'Grady v. City of Toronto* (1916), 37 O.L.R. 139, 31 D.L.R. 632; *Sawyer et al. v. Window Brace Limited*, [1943] K.B. 32, [1942] 2 All E.R. 669. A municipal corporation can act only through its representatives, and they in turn can act only in accordance with the statute: *H. Young & Co. v. The Mayor, etc. of Royal Leamington Spa* (1883), 8 App. Cas. 517.

*C. F. H. Carson, Q.C.*, in reply: Provision for payment in a particular place means payment in the currency of that place: *Wallace v. Souther* (1889), 16 S.C.R. 717.

*Cur. adv. vult.*

2nd November 1953. The judgment of the Court was delivered by

HOGG J.A.:—This appeal is from a judgment of Mr. Justice LeBel, whereby he dismissed the claim of the appellant for money alleged to be due under certain debentures issued by the respondent corporation and held by the appellant corporation. We regret that it appears to us to be necessary, for a reasonable consideration of the issue between the parties, to set out in some detail the facts as they were presented in evidence.

The City of Toronto Debt Consolidation Act, 1889 (52 Vic., c. 74), authorized the Corporation of the City of Toronto to issue debentures to obtain moneys needed to meet certain requirements. Sections 3 and 4 of the Act read:

"3. The said debentures, so to be issued, may be styled 'City of Toronto General Consolidation Loan Debentures,' and may be issued from time to time, as occasion may require, and in such amounts as may be found expedient to secure advantageous sales, and the said debentures may be made payable

at any place in Canada, Great Britain, the United States of America, or elsewhere, and may be in sterling money of Great Britain or currency of Canada or the United States of America, and such debentures shall be in sums of not less than \$100 currency or £20 sterling.

"4. The said debentures may be in the form shown in schedule A to this Act, or as near thereto as the corporation may find convenient, according to the places where, and the money in which, the same are made payable."

The schedule provides that the debentures shall bear the seal of the corporation and be signed by the mayor and the city treasurer.

On the 16th July 1909 the corporation, acting under the sanction of the aforesaid statute, passed By-law 5338 authorizing the issue of "City of Toronto General Consolidation Loan Debentures" to the amount of \$250,000 for the purpose of constructing and enlarging certain public schools. The by-law provides, *inter alia*, that it shall be lawful for the mayor of the City and the city treasurer to raise the sum of \$250,000 upon the security of the debentures "either in currency or sterling money", the number of debentures to be for such sums as may be required, but not to exceed the above-mentioned sum. The debentures are to be "sealed with the seal of the said corporation, and be signed by the Mayor and the Treasurer". They are to bear date the 1st July 1909 and to be payable on the 1st July 1948, "either in currency or sterling, in Canada, Great Britain, or elsewhere". Clause 5 of the by-law provides for the establishment of a sinking fund and enacts that during the 39 years of the currency of the debentures the sum of \$10,000 shall be raised annually for payment of interest and the sum of \$3,561 shall be raised annually for the purpose of forming a sinking fund for the payment of the principal loan when it shall fall due.

Pursuant to this by-law the respondent corporation printed debentures dated the 1st July 1909, which, as is shown on the face of the certificates, were payable on the 1st July 1948 at Lloyds Bank Limited, London, England, in pounds sterling. The debentures totalled in amount the sum of £51,369 17s. 3d, which is, according to the evidence, the equivalent of \$250,000 at the rate of \$4.86⅔ to the pound sterling.

By letter dated 13th November 1911 Mr. R. T. Coady, the city treasurer, placed before the treasury board of the respondent corporation, comprised of the mayor, the treasurer and two other members of the city council, an offer from Messrs. G. A. Stimson & Co., stockbrokers of the city of Toronto, to purchase £98,900 of the City's debentures. The city treasurer recommended to the meeting that the offer be accepted, subject to the following conditions:

"1. That the Debentures will be held in this Country with interest and principal payable here or in New York, as arranged with the City Treasurer.

"2. That the Debentures be sold on the distinct understanding that they will not be negotiated in Great Britain, in order that they may in no wise conflict with our forthcoming large loan in London, early next year."

The recommendation of the city treasurer was approved by the meeting subject to the conditions above stated.

On the 18th November 1911 the city treasurer wrote to Messrs. G. A. Stimson & Co. in part as follows:

"I write you with reference to the following Debentures which you purchased from the City of Toronto . . . By-law No. 5338, Debentures . . . £46,800.

"In compliance with your request and in order to suit the convenience of your client, this Corporation will make payment of principal and interest either at The Canadian Bank of Commerce, New York City, or the Bank of Toronto at Toronto, (your clients to decide which Bank) instead of at London, England. Payment will be made at the par of exchange (9½%)."

Messrs. Stimson & Co. apparently answered this letter on the 8th December 1911, and on the 9th December a further letter from the city treasurer to Messrs. Stimson & Co. sets out in part as follows:

"I write you, in reply to your letter of the 8th inst., respecting the following City of Toronto Debentures purchased by you: . . . By-law No. 5338 . . . £46,800.

"In order to suit the convenience of your client, this Corporation will make payment of the principal and interest of these Debentures at the Canadian Bank of Commerce, New York City, instead of at London, England. Payment will be made at the par of exchange (9½%)."



Each of these letters concludes as follows:

"Given under the Seal of the Corporation of the City of Toronto [the 18th November and 9th December 1911 respectively]." The letter of the 18th November is signed "R. T. Coady, Treasurer". The letter of the 9th December is signed "R. T. Coady, City Treasurer, Keeper of Civic Seal". Both of these letters were received by Stimson & Co. before they had paid for the debentures and before the debentures had been delivered to them.

On the 19th May 1936 the appellant corporation purchased the debentures through its broker to an amount of £20,000 and paid for them on 1st June 1936, on which date the bonds were delivered to the purchaser. Mr. C. S. Robinson, president of the appellant corporation, who said he was responsible for negotiations leading up to the purchase of the bonds, testified that at the time of the purchase he was aware of the letter of the 18th November 1911 above referred to written by the respondent corporation, and that as this letter was not attached to the bonds when they were delivered to the appellant corporation their treasurer requested and obtained from the respondent a copy of the said letter.

Further testimony on the part of Mr. Robinson was to the effect that the letter was commonly known "in the street" as "the Coady letter". Apparently some 250 copies of this letter had been issued. He further testified that the appellant corporation was of the opinion and considered that it was purchasing what is known as a "three-way bond", that is to say, "a bond payable on either one of the three markets, London, New York or Toronto", and that the appellant paid a premium for the debentures because it considered it was purchasing a bond of this nature.

A statement prepared by the respondent corporation and put in evidence shows that the interest coupons attached to these bonds were paid in the city of New York in the years 1927 to 1933, in London, England, in the years 1934 to 1938, again in New York in the year 1939 and January 1940, and in Toronto from July 1940 to January 1948. Prior to and on the 1st July 1940 the coupons were paid at the rate of \$4.86 $\frac{2}{3}$  to the pound, at New York City and Toronto, although the rate on 2nd January 1940 was \$3.94 $\frac{3}{4}$  in New York City and in July 1940 was \$4.47 in Toronto. Mr. R. R. Gillespie, the present city treasurer,

testified that there was no record of where the interest coupons on the bonds were paid prior to 1927.

On the 10th July 1940 the board of control of the respondent corporation, upon being advised by the city solicitor that the letters of the 18th November and 9th December 1911, amending the bonds, were of no effect, instructed the city treasurer to pay the coupons only in accordance with the terms appearing on the face of the debentures. The respondent corporation refused from and after the 1st January 1941 to pay the interest coupons at an amount greater than the pound at the current rate of exchange. This sum was accepted by the respondent corporation, but without prejudice to its right to claim an additional payment.

On the 1st July 1948, when the debentures became due, the appellant presented them for redemption but refused to accept payment at \$4.02, the current rate of exchange of sterling money on that date. The appellant subsequently brought the present action claiming payment of the debentures in United States dollars, the amount of such dollars to be arrived at by providing the sum of \$4.86 $\frac{2}{3}$  for each pound stated on the face of the bonds, and the appellant also claimed the difference between the amount received for the interest coupons and the payment of such coupons in dollars to be calculated in the same manner.

The learned trial judge held that the terms of the debentures were validly amended by the letters of the city treasurer under the seal of the respondent corporation of the 18th November and 9th December 1911, in making the place of payment the city of New York instead of the city of London. We are entirely in agreement with this finding on the part of Mr. Justice LeBel. An alteration could be made in the debentures in question if made in accordance with the rules governing the alteration of contracts under seal. The seal of the respondent corporation, although the signature of the mayor was lacking, was sufficient; delivery of the debentures had also taken place: *Town of East-view v. Roman Catholic Episcopal Corporation of Ottawa* (1918), 44 O.L.R. 284, 47 D.L.R. 47. In any event, the absence of the signature of the mayor from the amending document was an irregularity which was cured by s. 9 of The City of Toronto Debt Consolidation Act, 1889, which deals with irregularities in the form of the debentures or by-law.

However, the learned trial judge was of the opinion, and so held, that the mayor and the treasurer had no authority under the by-law to alter or amend the debentures so as to bind the corporation to make payment at the par rate of exchange of  $9\frac{1}{2}$  per cent., that is to say, at the rate of  $\$4.86\frac{2}{3}$  to the pound, for the reason that the undertaking to do so changed "the very nature of the security itself". He held that The City of Toronto Debt Consolidation Act, 1889, and the by-law in question, contemplated and authorized only "a debenture payable in Canada or England or elsewhere according to the true rate of exchange existing at the time of payment, not to a rate of exchange that could be fixed or 'pegged' by the Mayor and/or the Treasurer". In his view the intention of the parties was that the bonds were to be valued "at whatever value they attained in the free market". The learned trial judge doubted whether even if the by-law had authorized the officials of the respondent corporation to fix a certain rate of exchange for the pound sterling, it would have been valid under the enabling legislation.

The contention of counsel for the appellant is that the letters of the 18th November and the 9th December 1911 did not purport to fix or "peg" the rate of exchange at which the bonds payable in sterling currency would be redeemed at their maturity. Mr. Carson argued that the above-mentioned letters were intended to, and did validly, amend or alter the bonds so as to make them not only payable at New York City, but also payable in United States dollars instead of in sterling currency. It was argued that the mayor and the city treasurer were given authority under the enabling Act and the by-law to instruct, if they had seen fit to do so, the printers of the bonds to change the amount of the debentures from the amount expressed in pounds sterling to an amount expressed in United States dollars, the amount of such dollars to be found by allowing  $\$4.86\frac{2}{3}$  in United States dollars for each pound sterling secured by the bonds as originally printed and the further argument was advanced that the provision in the letters amending or altering the bonds so that the debentures would be paid "at the Canadian Bank of Commerce, New York City, instead of at London, England . . . at the par of exchange ( $9\frac{1}{2}\%$ )" was not an attempt to fix or "peg" the rate of exchange but was, in reality, equivalent to changing the face of each debenture by striking



out the words "at Lloyds Bank Limited, London, E.C., England" and substituting the words "at the Canadian Bank of Commerce, New York City", and by striking out the words "£500 sterling" and substituting the words "\$2433.33 in United States currency".

It has been said that "debenture" means a document which either creates a debt or acknowledges it and that any document which fulfils either of these conditions is a debenture: *Levy v. Abercorris Slate and Slab Company* (1887), 37 Ch. D. 260, per Chitty J. at p. 263. It is a contract to pay a sum of money, usually with interest, and in the present instance the debentures are contracts under the seal of the respondent corporation.

The language of the amending letters is, in a certain particular, ambiguous and requires, or is susceptible of, explanation. Extrinsic circumstances may therefore be considered in an attempt to arrive at the true intent and meaning of the words used.

It is apparent that the respondent corporation considered, up to the time it was otherwise advised by the city solicitor, that the letters formed a part of the debentures and were intended to and did alter them to the extent not only that the place of payment was changed, but that, moreover the amount of dollars to be paid in redeeming the interest coupons was to be calculated at the rate of  $\$4.86\frac{2}{3}$ . As has been stated, the interest due in January and July 1940 was paid at New York and Toronto respectively at the rate of  $\$4.86\frac{2}{3}$  to the pound although the current rate of exchange at that time was only  $\$3.94\frac{3}{4}$  in New York City and  $\$4.47$  in Toronto.

By-law 5338 was concerned with the securing of \$250,000 and the debentures were issued for the purpose of obtaining this amount of dollars. The number of bonds to be issued was governed by the number required to raise the above-mentioned sum in dollars, whether the debentures were issued in sterling or in dollars. The amount to be raised for interest and sinking fund to pay off the bonds was expressed in the by-law in dollars. It would seem, therefore, to be clear that in arriving at the total number of the bonds to be issued, it was contemplated that they would be paid at maturity at the rate of  $\$4.86\frac{2}{3}$  for each pound set out on the face of the debentures. Also the amount stated in the by-law, to be raised for the payment of interest and for the sinking fund, would be in excess of the amount required if, at the maturity of the bonds, the amount

to be paid to the debenture-holders was calculated on the basis of allowing less than \$4.86 $\frac{2}{3}$  for each pound shown on the face of the bond certificates.

The following circumstances may throw some additional light in arriving at the true meaning and intent of the alterations made in the debentures by the letters in question. Firstly, the statement contained in the letters that it was in order to "suit the convenience of your client" that principal and interest would be paid in New York City at "the par [rate] of exchange (9 $\frac{1}{2}$ %)". The so-called clients were in the United States and would, under ordinary circumstances, consider repayment of the bonds in terms of dollars. Secondly, the condition imposed by the city treasurer in recommending the sale of the debentures to Stimson & Co. that the bonds should not be negotiated in London because of a forthcoming large loan to be secured in that city.

We have reached the conclusion that the intention expressed in the letters of the 18th November and 9th December 1911 was not only to alter and amend the terms of the debentures in question in the action, by changing the place of payment from London to the Canadian Bank of Commerce in the city of New York, but the letters were, as well, an undertaking to pay the bonds in dollar currency instead of sterling currency. The method adopted to signify the intention and undertaking of the respondent corporation was inexpedient and clumsy, as well as being ambiguous in its meaning, although it had the effect of saving the expense of printing new bond certificates.

The statute and by-law enact that the debentures may be in "sterling money" or dollar currency. We agree with the opinion of the learned trial judge that the words "sterling money" in the Act or in the by-law mean the pound at its value in dollars at the rate of exchange on the date when the sum due, expressed in pounds, is paid. We think that, subject to the curative effect of certain legislation hereinafter referred to, the respondent corporation would not have been entitled to make such an alteration in the debentures while they remained debentures to be paid in "sterling money" as would give a fixed value in dollars to the pound regardless of its current value in dollars or, as it has been termed, "peg" the rate of exchange.

The curative provisions of s. 6 of An Act respecting the City of Toronto, 1910 (Ont.), c. 135, and s. 334 of The Municipal Act,

now R.S.O. 1950, c. 243, must be examined in order to ascertain their effect upon the debentures involved in this action. This legislation is not referred to in the reasons for judgment of the learned trial judge.

Section 6 of the 1910 statute reads as follows: "The by-laws of the Corporation of the City of Toronto specified in Schedule 'B' hereto, and all debentures issued or to be issued thereunder, and all assessments made or to be made, and all rates levied or to be levied for the payment thereof, are validated and confirmed, and the said Corporation is declared to have had power to pass, issue and levy the same." Schedule "B" to this statute includes By-law 5338 authorizing the issue of the bonds with which this action is concerned.

The words "all debentures issued or to be issued thereunder" are not limited in their scope. They are directed to, and embrace, the debentures in their final form, whether or not such debentures conform to the terms of the enabling Act and by-law. The actual debentures, consisting of the printed certificates and the amendments made thereto, in all of their particulars, are "validated and confirmed" and furthermore, the respondent corporation is "declared to have had power to . . . issue" them. Any lack of power on the part of the respondent corporation under the enabling Act and by-law to issue the debentures in the form in which they finally appeared was bestowed upon the respondent by the 1910 statute and any exercise of power in excess of that given by the enabling Act was ratified.

Section 334 of the present Municipal Act is in the following language: "Where the interest for one year or more on the debentures issued under a by-law and the principal of any debenture which has matured has been paid by the corporation, the by-law and the debentures issued under it shall be valid and binding upon the corporation." The interest due upon all of the debentures in question held by the appellant corporation has been paid for more than one year.

In *Standard Life Assurance Company v. Tweed* (1903), 6 O.L.R. 653, a by-law authorizing certain debentures issued by the Village of Tweed failed to provide for the payment of interest upon the debentures so issued. All interest on the debentures was duly paid, but not the principal, although it had fallen due. The section of The Municipal Act in force at the time the judgment in that case was delivered is substantially the same



as the present s. 334. Chancellor Boyd, who delivered the judgment of a Divisional Court, said at p. 655:

"The principal enunciated in the curative enactment appears to be that one payment of interest will validate the debenture in respect of which it is paid, and one payment of principal will validate the series in respect of which it is paid."

In *Wilson v. Corporation of Delta*, [1913] A.C. 181, 8 D.L.R. 881, 22 W.L.R. 931, the Judicial Committee of the Privy Council considered s. 146 of the British Columbia Municipal Act, 1892. That section provided that: "When debentures have been issued under a statute or under a by-law and the interest on such debentures and the principal of such thereof (if any) as shall have fallen due has been paid for the period of one year or more by the municipality, the statute and the by-law and the debentures issued thereunder or such thereof as may yet be unpaid, shall be valid and binding on the corporation and shall not be quashed or set aside on any ground whatever." A by-law, which authorized the construction of a dyke along a river bank and provided for the cost of the same by the issue of debentures, was attacked on the ground that variations had been made in the plan of the works authorized, which variations affected the validity of the bonds. The aforesaid s. 146 of The Municipal Act was set up as an answer to the claims put forward in the action.

Lord Moulton, who delivered the judgment, said at p. 188, in reference to the aforesaid section: "It was suggested on behalf of the appellant that the effect of this section was limited to the validation of the debentures issued. Their Lordships can see no ground for this contention. The section provides plainly that under circumstances which are admittedly to be found in the present case 'the statute and the by-law . . . shall be valid . . . and shall not be quashed on any ground whatever'." The statute, the by-law and the debentures are all made valid.

We are of the opinion that, apart from the reasons already advanced for holding that the bonds were to be paid in dollars, the debentures, consisting of the printed certificates and the letters in question, are to be considered valid and binding on the respondent corporation because of the terms of the curative sections aforesaid, for repayment of a sum to be ascertained by giving each pound represented on the face of the certificates the value of \$4.86%.

Because the respondent corporation took the method it did, of undertaking that the debentures as printed would each produce \$2433.33, it did not do something which, with the greatest respect for the learned trial judge, whose opinion we value highly, changed the nature of the debentures to such an extent that they could not find a place within the broad confines of the curative sections.

The appeal should be allowed with costs of the appeal and the trial. The appellant corporation is entitled to have the principal of the debentures paid in United States dollars or their equivalent in Canadian currency, the United States dollars to be calculated at \$4.86 $\frac{2}{3}$  for each pound stated on the face of the bond certificates, with interest. Also the appellant is entitled to be paid the difference between the amount already received for interest and such interest similarly calculated at \$4.86 $\frac{2}{3}$  for each pound.

In the event of the parties being unable to agree upon the amounts payable for principal and interest, this matter shall be settled by the Senior Master at Toronto.

*Appeal allowed with costs throughout.*

*Solicitors for the plaintiff, appellant: Sinclair, Goodenough, Higginbottom & McDonnell, Toronto.*

*Solicitor for the the defendant, respondent: W. G. Angus, Toronto.*

## [COURT OF APPEAL.]

**Fergusson v. The Public Utilities Commission of the Town of Dundas.**

*Public Utilities—Special Agreement for Supply of Water—Interpretation of Agreement—Water Taken from Source previously Supplying Individual—Compensation by Supply of Free Water.*

A municipality set up a waterworks system taking water from, *inter alia*, a spring from which one C had previously obtained his supply of water. The council adopted the report of a committee recommending "that the Town give him [C] a supply of water with half inch pipe from the Main to the House he now occupies to be used only for domestic purposes as an equivalent for water taken by the Town from the Spring". Water was supplied for many years, without charge, to C and his successors in title.

*Held*, since this document was not clear on its face, the Court was entitled to look at the surrounding circumstances to ascertain what agreement was actually made between the parties. Those circumstances showed that the Town agreed to give C and his successors in title a supply of water, free of charge and subject only to the limitations set out in the report without limitation of time, as compensation for taking the flow of water from the spring. The parties regarded C's previous right to take water from this spring as being appurtenant to his land, and the Town gave him an "equivalent", which must be similarly appurtenant. The plaintiff, having acquired the land formerly owned by C, was therefore entitled to receive a supply of water under the same conditions and without payment.

AN APPEAL by the plaintiff from the judgment of McCombs Co. Ct. J., of the County Court of the County of Wentworth, dismissing the action.

18th September 1953. The appeal was heard by LAIDLAW, AYLESWORTH and GIBSON JJ.A.

A. C. Heighington, Q.C., for the plaintiff, appellant: The fundamental question in this appeal is whether the right to a supply of water in substitution for the water formerly obtained by Crossland from the spring constituted an easement or a mere personal licence. In 1884 the owner of the lands, Crossland, obtained his water from a spring arising on neighbouring lands. The Town of Dundas drained this spring and gave Crossland a limited supply of water in its place, under contract. This was an executed contract, and therefore remains binding. [LAIDLAW J.A.: Your submission is that Crossland had a right to a continued supply of water and that this right was appurtenant to the land, and not a mere personal licence?] Yes. There was water there for him, it was taken by the Town, and other water was given in substitution for it, and this constituted a binding contract. For 64 years the subsequent owners were given water free of charge. In 1947 the house was converted into three apart-



ments, but the location of the water-pipe was not changed. If the right to free water did not extend to Crossland's successors in title the supply of water might have been stopped if Crossland had sold the house the day after the contract was executed, which would be absurd.

We were entitled, under the Town's contract, to a supply of water through a ½-inch pipe, to be used for domestic purposes only. The fact that the house was made into apartments is of no consequence. The application for water signed by the plaintiff was, as found by the trial judge, signed under a mistake of fact, and therefore does not preclude us from succeeding in this action.

Where an easement is created by contract it may be enforced by injunction. The defendant is estopped from denying its existence: *Combe v. Combe*, [1951] 2 K.B. 215, [1951] 1 All E.R. 767; *Gale on Easements*, 11th ed. 1932, pp. 560, 570.

A. J. Nash, for the defendant, respondent: The evidence is that the Town gave *the original owner* a supply of water, but no continuing right, appurtenant to the land, was given. It was the privilege of the Town to cancel the agreement, since it constituted a mere personal licence to the original owner, and the contract ended with his death.

A. C. Heighington, Q.C., in reply: We seek to establish a contractual liability of the Town to provide water through a ½-inch pipe perpetually, irrespective of changes in ownership, and we ask for a declaration that the Town is so bound. [AYLESWORTH J.A.: The language used by the Town in the report of the waterworks committee seems to indicate consideration, in that it speaks of what is to be given to Crossland as an equivalent for what is taken from him.]

*Cur. adv. vult.*

5th November 1953. The judgment of the Court was delivered by

LAILAW J.A.:—This is an appeal by the plaintiff from a judgment pronounced by His Honour Judge McCombs on the 30th March 1953, dismissing with costs an action in which the plaintiff asked for a declaration that he was entitled to an easement free of charge for a supply of water through a ½-inch pipe leading from a watermain in the town of Dundas to the house on the lands of the plaintiff; for repayment to him of the sum of \$170.30 for water supplied to the premises of the plaintiff, for

which he alleges he was wrongfully obliged to pay; for a mandatory order requiring the defendant to furnish the house on the plaintiff's lands with a supply of water free of charge for domestic purposes in accordance with an agreement binding on the defendant; and for the sum of \$200 damages for breach of contract.

The facts so far as they are known are not in dispute. On 4th September 1882 the municipal council of the Town of Dundas enacted By-law 300 providing for a loan upon the security of debentures for the purpose of constructing a system of waterworks. The work of construction included a reservoir which was to be supplied with water from springs "all along the mountain". One of those springs "on railway property" appears to have been the source of water supply for the premises now owned by the plaintiff which, in 1884, were owned by a Mr. Crossland. A waterworks committee made a report to council which, in part, referred thereto. An extract from the report put in evidence is as follows:

"In regard to the petition of Mr. Crossland your committee recommend that the Town give him a supply of water with half inch pipe from the Main to the House he now occupies to be used only for domestic purposes as an equivalent for water taken by the Town from the Spring on the Railway property and which formerly came through his house."

That report was adopted by the council of the municipality at a meeting on 3rd November 1884. Commencing some time after that date and continuing without interruption until the plaintiff acquired title to the lands by deed dated 15th December 1947, water was supplied to the house on the lands through a ½-inch pipe which ran from a main of the waterworks system into the basement of the house. No charge was made against any of the successive owners of the property for the water taken by them through the ½-inch pipe. On one occasion, however, said by the then owner Mrs. Jessie Kennedy to be "12 or 13 years ago", she received a notice or a bill from the public utilities commission indicating that she "had to pay" for water supplied, but when she pointed out to the secretary of the commission that she had never paid and did not intend to do so "nothing more came of it than that". The secretary of the commission testified that when he took the position in 1924 it was brought to his attention that some houses did not have water-services; that this

house had water-services but that no bill was rendered. After he spoke to Mrs. Kennedy, the then owner, and learned that she and her father before her had always received water free of charge, he endeavoured to find out what arrangement had been made in the matter but he could not do so.

After the plaintiff purchased the property in 1947 he converted the single-dwelling house thereon into three separate apartments with separate entrances. He did not change the location of the  $\frac{1}{2}$ -inch pipe. On 7th May 1948 he signed an application for water-service for the premises and the conditions therein set forth are intended to impose liability for payment for water supplied by the public utilities commission to the premises. The learned trial judge finds that he signed this and applications for water-service for other properties which he had purchased "as a matter of form" and "without reading them". Afterwards the plaintiff wrote a letter to the defendant asking for free water for the three apartments. The commission resolved that the water be metered and charged for in the usual manner, but later, due to lack of pressure and the necessity for pumping, resolved that the plaintiff be billed on one meter and at a one-meter rate rather than on three meters and at the rate for three meters. Accounts to the amount of \$180.56 for water supplied from August 1948 to December 1952 were paid by the plaintiff to the defendant under protest.

The learned trial judge expressed the view that "the important point is the interpretation and the effect to be given to ex. 1a", that is, the extract from the report of the waterworks committee as adopted by the council on 3rd November 1884. He said that the recommendation as set out therein was in clear concise English and he appears to have been of the opinion that the effect of adopting the report was "to make an agreement with Mr. Crossland for the supply of water as therein set forth". With that view of the matter he determined that the rights and privileges arising therefrom were personal to Mr. Crossland, the owner of the premises at that time, and to his family and that they did not extend to his successors and assigns.

With much respect for the opinion of the learned trial judge, I express the view that the extract from the report made by the waterworks committee is not clear in meaning. The recommendation is expressed to be "in regard to the petition of Mr. Crossland" but there is no evidence as to the contents of that petition.



The supply of water by the Town is to be "an equivalent" for water taken by the Town from the spring on railway property "which formerly came through his [Crossland's] house". I am not certain from that language whether there was a flow of water in a defined channel from the spring through the land owned by Mr. Crossland, nor do I know the extent of the flow to enable me to say what was equivalent to it. There was no formal agreement executed by the parties setting forth their respective rights and obligations and I cannot regard the extract from the report made by the waterworks committee, as adopted by the council of the municipality, as a settled memorandum of agreement containing all the terms thereof. I think it was not intended by the waterworks committee as such and there is nothing to indicate that Mr. Crossland had any knowledge at any time of the contents of the report. The terms of the agreement were probably discussed and settled orally by a representative of the Town and Mr. Crossland and the report made by the waterworks committee serves only as a memorandum made by it for its own purposes.

Regarded in that way, I think it is quite open to the Court to consider the surrounding circumstances so far as they appear in evidence to determine the real intention of the parties when they entered into an agreement. It appears to me that at that time the waterworks committee and the Town regarded the right to the flow of water "from the spring on railway property", which they proposed to acquire from Mr. Crossland, as one that was properly the subject of compensation. They did not treat it as a personal licence enjoyed by him and his family at will and in respect of which he had no claim if he was deprived of it, but rather as a right to water flowing across his land "which formerly came through his house". It was treated as a riparian right appurtenant to his land.

That view has some support from the fact that subsequently in 1891, when the Town provided for an addition or extension to its waterworks and the issue of debentures therefor, an estimate of expenditures to be incurred for the construction of the addition included an item "to cover cost of acquiring right to flow of water from springs on lands of various owners" as appears from an attachment to By-law 382, dated 7th December 1891.

The waterworks committee could have settled the amount of compensation to be paid to Mr. Crossland if it had chosen to do so, and thereupon taken from him a release from all future claims, binding on him and his assigns, but instead of taking that course it chose to provide a supply of water through a ½-inch pipe from a main pipe of the waterworks system to the property of Mr. Crossland in substitution and “as an equivalent for” water taken by the Town which “came through” the Crossland house. If the Town had not taken water from the spring on railway property which flowed on to Crossland’s land it may be assumed that the flow of water would have continued not only for his enjoyment and use but also for the enjoyment and use of his successors and assigns. The gist of the bargain between the Town and Mr. Crossland was that the Town would provide a supply of water in lieu of the water coming to Crossland’s land from the spring.

There is no evidence of a stipulation as to the period of time during which the Town was to supply water in that way and in the absence of such evidence it is not unreasonable or unjust to conclude that no limitation of time was intended by the parties to the agreement. In particular I cannot reach the conclusion that the parties intended that the free supply of water by the Town was to continue only during the period of occupation of the premises by Mr. Crossland and his family. On the contrary, in my opinion the obligation of the Town and of the public utilities commission of the Town continued notwithstanding the changes of ownership or occupation of the premises. That view is consistent with the language in the report made by the waterworks committee that the water to be supplied by the Town was “an equivalent for water taken by the Town . . . which formerly came through his [Mr. Crossland’s] house”. That view is consistent also with the acts done by the Town and the public utilities commission of the Town subsequent to the agreement. In 1890 Frederick Oakes became the owner of the property. In 1903 Mrs. Jessie Kennedy succeeded in title and continued in possession until she transferred it to the plaintiff in 1947. Throughout the whole period of time from the first supply of water to the premises until the plaintiff acquired his title there was no interruption and there was no claim for payment against the occupants, except on one occasion, as mentioned, notwithstanding the changes of ownership and occupation. There was

no attempt to compel payment or to enforce any rights now insisted upon by the defendant. It is my opinion that the evidence showing that the Town and the public utilities commission continued to supply water free to all successive owners and occupants of the lands as described is relevant evidence and of great weight in deciding the question in controversy. The public utilities commission acted on the authority of the report of the waterworks committee as adopted by the municipal council on 3rd November 1884, and, in my opinion, their acts purporting to have been done under that document afford the best possible evidence as to the interpretation which the Commission placed upon it.

While counsel have not referred the Court to any case precisely in point, I find some assistance in the reasoning of Lord Blackburn in *The Trustees of the Clyde Navigation v. Laird & Sons* (1883), 8 App. Cas. 658 at 670. The question in that case was whether navigation dues were legally payable on timber floated up the River Clyde in logs chained together. From 1858 to 1882 dues had been levied and had been paid without protest under The Clyde Navigation Consolidation Act, 1858. On the question of non-resistance as a guide, Lord Blackburn said:

"I think that raises a strong *prima facie* ground for thinking that there must exist some legal ground on which they [the merchants] could not resist. And I think a Court should be cautious, and not decide unnecessarily that there is no such ground."

Likewise, in the instant case the fact that no effort whatever has been made to compel payment for water supplied to the successive owners and occupiers of the premises in question raises a strong *prima facie* ground for thinking that there was no right in law to such payment.

The defendant maintained that the character of the premises has been changed by the plaintiff by making three separate apartments out of a single dwelling-house and that therefore there is no obligation to continue the free supply of water to the altered premises. I cannot agree. The obligation of the defendant is not dependent upon the character of the premises and it is not discharged by a change made in them by the owner. The only limitation on the right of the plaintiff and the occupants of the premises is twofold: they are entitled only to the water that will flow through a ½-inch pipe leading to the premises from



a main of the waterworks system and the water must be used for domestic purposes only.

It remains only to consider the fact that the plaintiff signed an application for water service—and the conditions therein, purporting to make him liable for payment for the water supplied by the defendant to the premises. I am satisfied the application was signed under a mistake on the part of both parties. The plaintiff did not intend to surrender his rights to a supply of water free of charge and the defendant did not intend that the contents of the application should have the effect of releasing it from existing obligations. In the circumstances, the application cannot be a bar to the right of the plaintiff to appropriate relief.

I would direct that this appeal be allowed with costs. The judgment of the Court below should be set aside and in place thereof there should be judgment as follows:

(a) A declaration that the defendant is obliged to supply to the occupants of the lands and premises presently owned by the plaintiff, water free of charge for domestic purposes only, by a ½-inch pipe leading from a main pipe of its waterworks system to the said lands and premises.

(b) That the plaintiff recover from the defendant the sum of \$180.56.

(c) That the defendant pay to the plaintiff the costs of the action.

The plaintiff claimed in the action a sum of \$200 for breach of contract but there is no evidence to support that claim. The plaintiff also claimed a mandatory order requiring the defendant to furnish the house on the plaintiff's lands with a supply of water free of charge for domestic purposes as agreed. I think such an order is not necessary or appropriate in the circumstances.

*Appeal allowed with costs throughout.*

*Solicitors for the plaintiff, appellant: Shaver & Shaver, Dundas.*

*Solicitor for the defendant, respondent: Arthur J. Nash, Dundas.*

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## [COURT OF APPEAL.]

**Pawson v. The City of Sudbury.**

*Expropriation—Compensation—How Determined—Necessity for Excluding from Consideration Effect of Scheme of Expropriation on Value—Allowance for Special Value of Land to Owner—Potentialities of Land—Evidence of Sales of Comparable Property after Expropriation.*

It is too well settled to admit of any doubt that compensation for land expropriated is to be calculated as the value of the land to the owner at the time of the taking. *Cedars Rapids Manufacturing and Power Company v. Lacoste et al.*, [1914] A.C. 569, applied. In determining compensation, therefore, the arbitrator must exclude from consideration any effect that the scheme of expropriation may have had on the value of the land, whether that effect is to decrease or to increase the value. *Cunard et al. v. The King* (1910), 43 S.C.R. 88 at 99; *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20, applied. If the land has a particular value to the claimant (e.g., because the claimant contemplates a building-scheme) this must be taken into consideration and compensated for, quite apart from any allowance for compulsory taking. Cripps on Compensation, 8th ed., p. 213; *The King v. Hunting, Barrow and Bell* (1916), 32 D.L.R. 331 at 333-4, quoted and applied. The potentialities of the land must also be considered in determining its value. Evidence of sales of nearby and comparable lands made at or about the time of the expropriation (and even after the expropriation) is relevant and admissible in determining the value, although its weight will of course vary according to the nearness or remoteness of the date of sale. *The King v. Halin*, [1944] S.C.R. 119; *The Queen v. Potvin*, [1952] Ex. C.R. 436, discussed; *The Toronto Suburban Railway Company v. Everson* (1917), 54 S.C.R. 395, applied.

AN APPEAL by the owner of lands expropriated by the City of Sudbury from the award of compensation made by St. Aubin Dist. Ct. J. as official arbitrator.

16th October 1953. The appeal was heard by LAIDLAW, ROACH and AYLESWORTH JJ.A.

*F. A. Brewin, Q.C. (M. N. Lacourcière, with him)*, for the claimant, appellant: The appellant was the owner of five lots expropriated by the City of Sudbury under By-law 3606, dated 28th May 1952, as part of a project under s. 17 of The Planning Act, R.S.O. 1950, c. 277. The learned arbitrator found the total value of the lots to be \$4,750, and awarded that amount plus an allowance of \$475 for compulsory taking.

Our submission is that the learned arbitrator erred in principle in that: (1) he disregarded the legal principle requiring him to exclude from his consideration, in valuing the lands, the effect on them of the scheme of expropriation; (2) he made no allowance for special value to the owner, as distinct from market-value; (3) he rejected evidence of the sale of comparable lots after the passing of the by-law.

1. The amounts found by the arbitrator as the values of the different lots are exactly the amounts given in evidence by

the witness Neal, called by the respondent. It is apparent from Neal's evidence that he valued the lots as he saw them in August 1952, after the expropriation, and based his valuations on the new plan, and the facilities provided or to be provided under it. [AYLESWORTH J.A.: Was it a matter of common knowledge in the city that the new plan was mooted, with whatever advantages or disadvantages it would have?] It became commonly known in the summer of 1950, and the result of that knowledge must be disregarded in assessing compensation. While the by-law was not actually passed until May 1952, the City had proceeded according to the new plan to construct streets through our lots. The new plan was dated 22nd March 1950. It is clear that the new plan would enhance the value of some of the lots, but would greatly reduce the value of others.

The witness Duncan, called by the claimant, based his valuation on the assumption that no new plan had been filed, and in our submission his is the only valuation made on the correct principle. Neal apparently did not uniformly apply his criterion of valuing the lots as they were in August 1952, since he did value lots 352 and 357, although under the new plan (and therefore at the time he made his inspection) they were largely taken up by streets. It is clear that he based his low valuation of some of the lots upon the fact that they were landlocked and had no access and no services, and these facts resulted from the new scheme.

The arbitrator erred in accepting Neal's evidence because of its basis. The effect of the scheme of expropriation, and the circumstances that necessitated the expropriation, should both be excluded from consideration in determining the value of the lots for purposes of compensation: *Cunard et al. v. The King* (1910), 43 S.C.R. 88; *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20, 11 D.L.R. 529.

2. The Courts have made it clear that compensation is to be based on the value of the land to the owner; authorities are unnecessary for this proposition. [LAIDLAW J.A.: Is there any evidence of special value to the owner over and above the market-value?] Yes. The claimant's husband is a builder and could make a greater profit than one who had to hire builders, since he had a building-plan in mind. The learned arbitrator merely said that it would be difficult to assess any special value to the owner, and then, without making any finding as to whether or not there



was such a special value, proceeded to discuss the allowance for compulsory taking. The allowance for compulsory taking is something wholly apart from the conception of special value.

3. The learned arbitrator rejected all evidence of sales after the expropriation, on the authority of *The Queen v. Potvin*, [1952] Ex. C.R. 436. I submit that the *Potvin* case is wrongly decided in this respect. In *The Toronto Suburban Railway Company v. Everson* (1917), 54 S.C.R. 395, 34 D.L.R. 421, it was definitely held that such evidence was admissible, although it might be of greater or less weight, according to circumstances.

*H. F. Parkinson, Q.C.*, for the City of Sudbury, respondent: [LAIDLAW J.A.: The Court wishes to hear you only as to (1) the arbitrator's valuation being based on the new scheme, and (2) the rejection of evidence of subsequent sales.] The expropriation was made under s. 17 of The Planning Act. Section 18 of that Act provides that the provisions of The Municipal Act, R.S.O. 1950, c. 243, shall apply to the acquisition of land under s. 17. [LAIDLAW J.A.: Surely the arbitrator, in valuing the lots, must exclude any consideration of advantages or disadvantages consequent upon the scheme of expropriation?] Some services were put in by the City, for at least two of the lots, before the plan was registered. [AYLESWORTH J.A.: How do you justify Neal's basing his values on the scheme as envisaged?] I concede that Neal did consider the scheme as it affected three of the lots. [LAIDLAW J.A.: No doubt he did so with respect to all of them.]

I concede that if market-value is the sole criterion to be applied, evidence of subsequent sales of comparable property is admissible: *The King v. Halin*, [1944] S.C.R. 119, [1944] 1 D.L.R. 625, 56 C.R.T.C. 360. But if there is a question of a special value to the owner, over and above the market-value, such evidence is of no assistance, and should be excluded: *Hayden Warehouses & Storage Ltd. v. Toronto*, [1953] 1 D.L.R. 81, 70 C.R.T.C. 16. [LAIDLAW J.A.: Surely it is always admissible for what it is worth; it is a matter of weight rather than admissibility.]

*F. A. Brewin, Q.C.*, in reply.

*Cur. adv. vult.*

6th November 1953. The judgment of the Court was delivered by

ROACH J.A.: This is an appeal by the owner of certain lands in the city of Sudbury against an award made by His Honour Judge St. Aubin, on the expropriation by the City of Sudbury of those lands under The Planning Act, R.S.O. 1950, c. 277, as amended by 1952, c. 75.

The claimant was the owner of five lots as laid out on plan M-2S for the city of Sudbury, namely, lots 352, 99, 141, 147 and 357.

The acquisition of these and other lots on that plan was part of a project under the said Act to provide or facilitate the provision of housing accommodation. That project consisted of re-subdividing all that part of lands laid out on plan M-2S on which there were no buildings at the date of the expropriation by-law.

On plan M-2S, which I shall hereinafter refer to as “the old plan”, lots 352 and 99 fronted on Sudbury Street; lots 141 and 147 fronted on Hickory Street; and lot 357 fronted on Reginald Street.

On the new plan of subdivision the lands which formerly comprised lot 352 now form part of a new street called Ethelbert Street and part of a new lot fronting on Ethelbert Street. The lands which formerly comprised lot 99 now form part of a new lot on the new plan, but do not extend to the street in front of the new lot, that is, they are landlocked. The lands which formerly comprised lots 141 and 147 are also now landlocked. They are not contiguous to any street but form part of a block of land which is intended as a school-site. The greater part of the lands which formerly comprised lot 357 now form part of a new street called McNeill Street and the rest of those lands form part of the lands fronting on the north and south sides of McNeill Street.

The learned arbitrator awarded the claimant the sum of \$5,225 made up as follows

|                                                    |            |
|----------------------------------------------------|------------|
| For lot 352 .....                                  | \$1,600.00 |
| For lot 99 .....                                   | 750.00     |
| For lot 141 .....                                  | 800.00     |
| For lot 147 .....                                  | 400.00     |
| For lot 357 .....                                  | 1,200.00   |
|                                                    | <hr/>      |
|                                                    | \$4,750.00 |
| 10 per cent. allowance for compulsory taking ..... | 475.00     |
|                                                    | <hr/>      |
| Total.....                                         | \$5,225.00 |

Counsel for the appellant argued that the learned arbitrator had erred in four respects:

First: That he had disregarded the legal principle which required him in determining the compensation to which the claimant was entitled to exclude from his consideration the effect of the scheme of expropriation in enhancing or diminishing the value of the lots.

Second: That he had not made proper or any allowance to the claimant for the special or particular value these lots had for her.

Third: That he had excluded from his consideration very relevant evidence of sales of comparable property subsequent to the by-law.

Fourth: That he had not given any consideration to the potentialities of these lots.

I now proceed to discuss these grounds of appeal in the order in which I have stated them.

The amounts that the learned arbitrator has found to be the value of each of the lots is precisely the value placed upon them in evidence by the witness Neal, who was a real estate salesman called by the respondent.

I extract the following from Neal's evidence relating to lot 147: "Q. Your valuation is based on the fact that there is no street in front of the lot? A. That is right, and there are no services you know."

From Neal's evidence concerning lot 141 I extract the following: "Q. Will you describe the lot please to His Honour? A. This is a good lot, it is level, I don't believe there is any rock on it at all. The unfortunate part of it is with the new plan or even with the old plan there are no improvements on this lot either. I understand if a person wanted to build on there, from the new plan, it would be necessary to take the sewer and water some considerable distance or to get an easement off some lot closer. That being the case the lot would not be as valuable as if the street were directly in front of it and the services were there. My valuation of that lot as is without the services there, and the road not open would be \$800. You understand it would be worth considerably more than that if the services were there."

Before referring to Neal's evidence with respect to lot 99, I should say that plan M-2S was registered on 20th November 1909. Little or no work had been done on the street-allowances as laid



out on that part of that plan commencing with Hickory Street on the south and extending to the northern limit of the plan. It is that portion of the lands laid out on that plan that is embodied in the new scheme. As a result of this new scheme, the street-allowances as laid out on the new plan have been graded and municipal sewer and water services have been installed. All that was done prior to August 1952.

I now extract the following from Neal's evidence as to lot 99: "Q. Now, what would you say the value of that lot would be in August last year [1952] when you examined it? A. Considering the fact the street has been graded in front, and considering the fact that the water and sewer are on that street to the lot-line, my valuation as of August last year would be \$750."

Neal's evidence with respect to lots 352 and 357 is confusing. He seems to have valued those lots by reference to both the old plan and the new. He described lot 357 as being on Reginald Street and lot 352 as being on Sudbury Street. That was correct according to the old plan. However, he then says that his valuation is in part based on his understanding "that the grading and paving services are paid for". Now those services are not either on Reginald Street or Sudbury Street because both those old streets no longer exist and as I earlier pointed out the greater part of lot 357 now forms part of a new street, namely, McNeill Street, and the greater part of lot 352 forms part of a new street, namely Ethelbert Street. It is on those new streets that the paving has been done and the services have been installed.

That counsel for the municipality thought that it was proper to value the claimant's lots according to the new scheme is clear from his cross-examination of the witness Duncan, who gave evidence as to values on behalf of the claimant. I extract the following from his examination of that witness:

"Q. But Mr. Duncan, I just want your opinion on the value of this lot [lot 147] as it was in August last year, not as to what it might have been if they had followed this old plan? I don't want speculation. I am referring to the exact situation as it was in August when you were making this appraisal?

A. (No answer).

"Q. What value is the lot if there wasn't a street in front?

A. No lot is a lot without a street.

"Q. No. Now I suggest to you that the lot would be practically worthless to anyone buying it the way it lay in August of 1952, with no ingress or egress to the lot? A. According to the new plan it would be invaluable.

"Q. Valueless? A. Valueless.

"Q. It would have a nominal value? A. Yes, that is right.

"Q. In view of that would you state that Mr. Neal's figure of \$400 would not be too far out of line in view of the fact there was no street open in front of it? A. Well, it is not the owner's fault that the streets were changed.

"Q. I am not asking you whose fault it is; or asking you to blame anyone. I am asking if you agree with Mr. Neal in view of the situation as he found it in August of 1952? whether or not \$400 wasn't a fairly reasonable figure? A. Well, that is a hard question to put before anyone because if they are making this change and putting the lot out of existence which it looks like today then the lot is diminished in value naturally."

From the foregoing it is manifest that the witness Neal, in placing his valuations on the lots, did not exclude from his consideration the effect on those lots of the new scheme.

It would be manifestly unjust to the claimant that if the new scheme reduced the value of her lots she should be compensated on the basis of that reduced value. Likewise it would be unjust to the respondent that if this new scheme enhanced the value of those lots the claimant should be compensated on the basis of that enhanced value.

In *Cunard et al. v. The King* (1910), 43 S.C.R. 88 at 99, Duff J. (as he then was) stated the basis on which compensation to be awarded for lands taken under compulsory powers should be determined thus: "One principle by which the courts have always governed themselves in estimating the compensation to be awarded for property taken under compulsory powers is this: you are to apply yourself to the consideration of the circumstances as if the scheme under which the compulsory powers are exercised had no existence. . . . The circumstance that it is so required is not to enter into the computation of value as either enhancing or diminishing it."

In this Court in *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20 at 29, 11 D.L.R. 529, Hodgins J.A. stated the proposition thus: "The rule which excludes evidence of the rise in value [of the expropriated lands] caused by the particular

scheme under which the compulsory powers are exercised, ought equally to prevent evidence of the loss of value caused by the same scheme.”

It is clear from the learned arbitrator's written reasons, portions of which I shall later quote, that there was present to his mind the necessity, as he put it, for excluding from his consideration “all advantages or disadvantages resulting from the expropriation proceedings”. However, by accepting Neal's evidence as to values, he did not exclude them, because, as I have already made manifest, Neal did not exclude them. The learned arbitrator thereby, unwittingly, made the very error which he stated he should avoid.

I turn now to the second alleged error of which the appellant complains. I first quote from the relevant part of the learned arbitrator's reasons. He said:

“Having carefully considered the evidence of all of the witnesses and particularly that of Mr. Neal and Mr. Duncan who both impressed me as being very fair, I must find that the valuation made on the Pawson lots by Mr. Neal is the correct one in so far as the market-value is concerned at the date of expropriation, namely the 28th May 1952.

“In addition to this, one must also consider the value to the owner with all its potentialities excluding all advantages or disadvantages resulting from the expropriation proceedings. Mr. Pawson gave some evidence of the owner's intention to build on these lots for the purpose of sale. Although this evidence was far from satisfactory and as counsel for the City described it in his argument as being a somewhat nebulous building-scheme, yet I feel that it is a potentiality which must be taken into consideration.

“Upon the evidence before me the value to the owner of such a potentiality is difficult to determine. It is true an allowance for compulsory taking is not a matter of right yet in circumstances presenting difficulty or uncertainty in appraising values the practice of making that allowance may well be applied in this case as it was in *Irving Oil Company v. The King*, [1946] S.C.R. 551 [[1946] 4 D.L.R. 625], as well as in *Diggon-Hibben Limited v. The King*, [1949] S.C.R. 712 [[1949] 4 D.L.R. 785]. In granting a 10 per cent. allowance on this ground, which is the maximum, I have not overlooked the case of *The King v. Larivée*, 56 S.C.R. 376 [42 D.L.R. 151], and I must say that



'generosity' is not an element which enters into my consideration of the compensation to be allowed."

The law is now too well settled to permit of any doubt that the value to be paid for is the value to the owner as it existed at the date of the taking: *Cedars Rapids Manufacturing and Power Company v. Lacoste et al.*, [1914] A.C. 569, 16 D.L.R. 168, 6 W.W.R. 62. However, it does not follow that in every case the value to the owner is a sum in excess of the market-value. For example, I might purchase vacant lands on the outskirts of the city of Toronto for purely speculative purposes and without any intention of putting them to any particular use. At any given time they would have no special value to me as the owner over and above the then market-value. In purchasing them I would have in mind the possibility that the city would grow in this direction and the lands thereby become desirable for residential or other purposes and, when it thus became desirable, would increase in value. Such a possibility would be a potentiality that the lands possessed. That potentiality would be one of the factors by which the market-value would be determined. It would not constitute any special value peculiar to me as the owner over and above the value to any other person holding the lands for speculation.

The foregoing illustration may or may not be apt in the circumstances of the instant case.

There was some evidence that the claimant, whose husband is, or perhaps more accurately was, a builder, had some scheme in mind for building on these lots and that accordingly they had some special value to her. The learned arbitrator, although describing that evidence as "far from satisfactory" and the scheme as being "somewhat nebulous", nevertheless said that this scheme was a factor to be taken into consideration as constituting some special value to the claimant. He seems to have thought that if they had some special value to the claimant, she would be compensated for such special value over and above their market value out of the 10 per cent. allowance for the compulsory taking.

The learned arbitrator should have concluded as a finality as far as he was concerned whether or not these lands had in fact any special value to the owner. If they had, then quite apart from the 10 per cent. allowance, he should have compensated her for it.

In dealing with an allowance for compulsory taking, the author of Cripps on Compensation, 8th ed. 1938, p. 213, says: "The fact that lands have been taken under compulsory process does not alter the principle of valuation, and the customary addition of 10 per cent. can only be justified as a part of the valuation and not as an addition thereto. In practice the 10 per cent. is applied to the value of lands only, and not to incidental damage; this percentage may be taken to cover various incidental costs and charges to which an owner is subject whose land has been taken, and if no percentage were added such incidental costs and charges would have to be considered in assessing the amount of compensation."

In *The King v. Hunting, Barrow and Bell* (1916), 32 D.L.R. 331 at 333-4, Anglin J. said:

"Compensation should cover not merely the market value of the land, but the entire loss to the owner who is deprived of it. It must, therefore, usually exceed the market value, though it may occasionally be less, as where the land taken is, while in the owner's hands, subject to depreciatory restrictions from which it is relieved when expropriated. The 10% allowance is of course independent of and additional to any sum in excess of market value to which the owner may be entitled because of special adaptability of the expropriated premises to his purpose.

"Formerly larger (*The King v. Condon*, 12 Ex. C.R. 275), the allowance to cover all loss and damages over market value plus the value of special adaptability, which the deprived owner may sustain, has now in practice come to be fixed at 10%. The amount of a fair compensation to a deprived holder and not merely the value of the expropriated property to him being the subject of inquiry, the legality of including in it something to cover incidental and contingent losses and inconveniences is unquestionable; but the authority for fixing the 'additional allowance' at 10% depends entirely upon practice."

I turn now to the third alleged error.

The expropriation by-law was passed on 28th May 1952.

In the proceedings before the learned arbitrator, counsel for the claimant placed in evidence particulars of a sale of other lands in the neighbourhood in March 1953. The learned arbitrator held that evidence as to that sale was inadmissible because the sale had been made after the by-law was passed. As authority for excluding it, he referred to the judgment of the Exchequer

Court in the case of *The Queen v. Potvin*, [1952] Ex. C.R. 436 and quoted from the reasons of the learned President of that Court as follows:

"I ruled that in proceedings to determine the amount of compensation to which the owner of expropriated property is entitled evidence of sales made after the date of expropriation is inadmissible. After careful consideration I have reached the conclusion that this view is preferable to that expressed in *The King v. Edwards*, [1946] Ex. C.R. 311. There I referred to the serious doubts expressed by Taschereau J. of the Supreme Court of Canada in *The King v. Halin* [*infra*] as to the legality of proof of sales made after the date of expropriation. In expressing these doubts Taschereau J. spoke also for Rinfret J., as he then was, and Rand J. I am now of the view that these doubts were well founded and that effect should be given to them, notwithstanding the opinion expressed by Anglin J. in *Toronto Suburban Railway Company v. Everson* [*infra*]. Section 47 of the Exchequer Court Act, R.S.C. 1927, chapter 34, directs the Court to estimate the value of the expropriated property as at the date of the expropriation. If the Court is to obey this statutory direction it must focus its attention on the situation as it stood on the date of expropriation and put itself in the same position as if it were trying the action immediately thereafter. In that case there could not be any evidence of subsequent sales. Why should the fact that the trial is held later let in evidence that did not then exist? Surely the determination of the market value of the property as at the date of its expropriation ought not to be made on differing sets of facts depending on when the trial is held. It should be made on the same set of facts regardless of when it is held. The contrary view invites the introduction of a dangerous element of confusion into what is a sufficiently difficult task without it. Moreover, it is, in my opinion, more consistent with principle to exclude evidence of sales made after the date of expropriation than to admit it."

It is to be noted that in *The King v. Halin*, [1944] S.C.R. 119, [1944] 1 D.L.R. 625, 56 C.R.T.C. 360, Taschereau J. did no more than express serious doubt as to the admissibility of evidence of subsequent sales. In *The Toronto Suburban Railway Company v. Everson* (1917), 54 S.C.R. 395, 34 D.L.R. 421, Anglin J., with whom Fitzpatrick C.J. agreed, said that:



“Evidence of *bona fide* sales within a short time after an expropriation accompanied by proof that there had been no material change in value in the interval, would seem to me relevant and admissible.”

For myself, I do not know of any principle by which evidence of subsequent sales should be excluded. Evidence that is relevant is admissible. A sale of nearby and comparable lands made, say, the day following the expropriation, and without any knowledge by either the vendor or the purchaser of the expropriation, would be in my opinion very cogent and relevant evidence as to the value of the expropriated lands the day before. The mere accident that such a sale was made on the day after rather than the day before the expropriation should not render evidence of the sale inadmissible. The remoteness of the dates of sales, either before or after the expropriation, will of course affect the weight of such evidence.

In the instant case, the learned arbitrator in my opinion erred in actually excluding from his consideration evidence of the subsequent sale. In the interval between the date of the by-law and the date of the sale, events may have happened that detract from the evidentiary value of that sale. Those are matters that the learned arbitrator would have to consider.

I come finally to the fourth alleged error.

From what I have said in discussing the first error, it necessarily follows that the learned arbitrator did not consider the potentialities of these lots. The witness Neal valued them on the basis of their location on the new plan. By the new plan, any potentialities they had as building-sites were wiped out, and the learned arbitrator awarded the claimant, apart from compensation for compulsory taking, only the amounts at which the witness Neal valued them.

For the reasons aforesaid I would allow this appeal with costs and remit the matter to the learned arbitrator to be reheard by him. The appellant should also have her costs of the original proceedings before the arbitrator.

*Appeal allowed with costs.*

*Solicitors for the claimant, appellant: Cameron, Weldon, Brewin & McCallum, Toronto, and Lacourcière & Lacourcière, Sudbury.*

*Solicitors for the City of Sudbury, respondent: Facer & Shea, Sudbury.*

[SCHROEDER J.]

**Smith and Montgomery v. Johnson Brothers Company Limited.**

*Building Contracts—Subcontract—To what Extent Provisions of Head Contract to be Read into Subcontract—Terms of Reference to Head Contract.*

*Contracts—Interpretation—Reference in Subcontract to Terms of Head Contract—Whether Other Terms of Head Contract thereby Incorporated into Subcontract—When Term to be Implied in Contract.*

The plaintiffs entered into a subcontract with the defendant (a general contractor) for tunnelling work "according to the dimensions and specifications as set forth in the contract" between the defendant and the municipality. After the plaintiffs had been working for some time the work was stopped by the city engineer in the exercise of powers given to him under the head contract. The city engineer's order was based upon natural conditions at the site, and not upon any defect in the plaintiffs' work. The plaintiffs sued for damages for breach of their contract with the defendant.

*Held*, the plaintiffs were entitled to judgment.

The reference in the plaintiffs' contract incorporated the provisions of the head contract only for the purpose for which those provisions were expressly referred to, *viz.*, to govern the dimensions and other physical characteristics of the tunnel to be made by them. The reference was not sufficient to import into the plaintiffs' contract, so as to bind them, the sweeping and extraordinary powers exercisable by the city engineer under the head contract. It would have been quite simple for the parties, if they had so intended, to make provision in the subcontract for the events that happened. *Chandler Bros. Ltd. v. Boswell*, [1936] 3 All E.R. 179; *Tremblay v. Bouchard*, [1949] S.C.R. 552, considered.

Nor were the circumstances such as to require the Court to imply in the plaintiffs' contract a term excusing the defendant for non-performance in the events that had happened. The impossibility of performance was not natural or legal, but only a relative impossibility arising out of the defendant's own agreement, and it was the defendant's own fault if it ran the risk of undertaking to perform an impossibility; it could have guarded against that risk in its own contract with the plaintiffs, but omitted to do so. Such a term was not essential to give efficacy to the real intention of the parties. *F. A. Tamplin Steamship Company, Limited v. Anglo-Mexican Petroleum Products Company, Limited*, [1916] 2 A.C. 397 at 403; *Luxor (Eastbourne), Limited et al. v. Cooper*, [1941] A.C. 108 at 137, quoted and applied; *Metropolitan Water Board v. Dick, Kerr and Company, Limited*, [1918] A.C. 119, distinguished.

On the other hand, although the contract did not expressly bind the defendant to permit the plaintiffs to continue the work they had undertaken to do, such an agreement by the defendant must be implied into the contract to give it the efficacy that the parties intended. If such a term were not implied there would be such a failure of consideration as could not have been within the contemplation of the contracting parties.

AN ACTION for damages for breach of contract.

2nd and 3rd November 1953. The action was tried by SCHROEDER J. without a jury at Hamilton.

*J. L. Agro and A. J. Marck*, for the plaintiff.

*H. L. Hagey, Q.C.*, for the defendant.

13th November 1953. SCHROEDER J.:—The defendant company, which carries on the business of a general contractor, entered into a contract with the City of Hamilton in February 1951 to construct a tunnel sewer and main shaft through a portion of the Hamilton Mountain as more fully set out in the agreement and specifications. The plaintiffs, who are miners, were given a subcontract by the Johnson company dated the 26th February 1952 “for the execution of the work for the tunnel at the open portal for an approximate distance of 565 feet, also the ‘raise’ of approximately 144 feet 6 inches in height *according to the dimensions and specifications* as set forth in the contract, between the City of Hamilton and the [Johnson company]” (the italics are mine). The contract went on to provide for payment at the rate of \$28 per lineal foot for tunnelling of the horizontal section and \$26 per lineal foot for tunnelling of the vertical section. All tools, mining equipment and timber were to be furnished by the defendant company, the principal contractor. The agreement contains other provisions which are not material here.

The actual mining operations were commenced on 16th February 1952, and between that date and 18th March 123 feet of tunnelling had been completed. The plaintiffs employed men who worked two 8-hour shifts each day, four men being engaged on each shift. The defendant paid the hourly wages of the men, the cost of powder, fuses, wire and other materials used in the work by the plaintiffs, and the net amount payable to the plaintiffs in respect of the 123-foot tunnel which they had excavated was \$646.50 which netted them the sum of \$5.25 per lineal foot.

Prior to the commencement of work by the plaintiffs some 65 feet of what was described as the “portal shaft” had been excavated and this section had been concreted in accordance with the main contract specifications. On 17th March 1952 the city engineer, the city sewer engineer, the consulting engineer, Mr. Redfern of Toronto, the superintendent of works employed by the defendant company, Mr. George Keith, and Mr. David O. Johnson, the vice-president and general manager of the defendant company, met at the portal shaft. Following a discussion it was decided by the city engineers that it was necessary that the 123-foot section of the tunnel, which had been excavated and timbered, should be concreted before further mining was done, as it was too dangerous to proceed further with the tun-



nelling if this was not done. It was also suggested that if the nature of the substratum to be excavated did not change, it might be necessary to continue the work by concreting each 7-foot round as the mining progressed in order to avoid a cave-in of the tunnel roof. Pursuant to the powers vested in him by the head contract, the city engineer directed that the work of excavation be stopped by the contractor and that his directions as to concreting be carried into execution.

The powers exercised by the city engineer were conferred upon him by clauses 119 and 302 of the general specifications which were attached to and formed part of the main contract. He exercised his right to stop the work of excavation in pursuance of clause 318 thereof, which reads: "The City also reserves the right for the Engineer to stop the excavation or any other portion of the work and to require the Contractor to complete the sewer and backfilling up to such point as the Engineer may direct before proceeding further with the excavation, and the Contractor shall not hereby become entitled to demand or receive any allowance or compensation other than an extension of the contract time for as many days as the work has been delayed on account of such stoppage, as determined by the Engineer."

On 18th March Mr. George Keith, the superintendent of works employed by the defendant, advised the plaintiff Montgomery of these orders and stated that it would be necessary to suspend their operations until the aforementioned directions had been carried into effect. He handed both plaintiffs their unemployment insurance books and their pay-books with vacation stamps affixed to date, because they would be unable to carry on their work for several months. He offered to give them work in connection with the concrete construction at the rate of wages payable to labourers, but they would not accept this offer. The plaintiff Montgomery alleges that Mr. Keith told them that they were discharged and gave them no reason for his action, except to say: "I've put up with enough from you fellows bothering me for timber and stuff all the time. As long as I am superintendent here you will never be back on the job." I do not accept this evidence and prefer the evidence of Keith and the timekeeper, Robert Richard Rogers, on this point. I find as a fact that Keith apprised Montgomery on 18th March of the true reason for the necessity for postponing the progress of the mining work. It should be mentioned that if it became necessary, after

the completed section of the tunnel had been concreted, to concrete each 7-foot section as the tunnelling proceeded, the work of concreting each section would require several days so that the men engaged in the work of excavating would be able to work for a day or two and would then have to be laid off for several days while the concrete work was being done and the cement had time to set. It was therefore quite impracticable for the plaintiffs to continue their work under the contract unless they were also engaged in doing the concrete work. They were both trained to do this class of work and Mr. Johnson endeavoured to secure a tender from them on the work of tunnelling as well as concreting the remaining portion of the portal shaft, but they abstained from making a tender in accordance with his request. Accordingly, the defendant company completed the work itself and the plaintiffs instituted this action for damages for breach of contract on 9th April 1952. On 28th April 1952 they secured gainful employment in work of a similar nature for Curran and Briggs Limited, and at the trial they limited their claim for damages to such amount as they might have earned under the contract up to the 28th April 1952 if the breach alleged had not been committed.

No question is raised as to any failure on the part of the plaintiffs to perform the work undertaken by them in an adequate or workmanlike manner. The defence put forward is threefold:

(1) That the contract between the plaintiffs and the defendant had incorporated in it all the terms and provisions of the principal contract between the City and the main contractor, the Johnson company, or, in the alternative, that it was an implied condition of the said contract that the work would be done in accordance with the terms of the head contract and under the instructions and direction of the city engineer of Hamilton, Ontario, and that by reason thereof the defendant was entitled to discontinue the employment of the plaintiffs at any time.

(2) That in any event the agreement contained no express undertaking or agreement which obliged the defendant to permit the plaintiffs to do the work which by their contract they had offered to perform.

(3) That a term ought to be implied in the agreement whereby the contract was discharged through impossibility of performance.

It is, of course, well established that plans and specifications, if not contained in a contract itself but referred to therein or annexed thereto, must be construed therewith when identified. Wherever the plans and specifications are referred to for a specific purpose only, however, they become part of the contract for that purpose only and should be treated as irrelevant for all other purposes. The covenant of the plaintiffs to do the tunnelling "according to the dimensions and specifications as set forth in the contract between the City of Hamilton and the [Johnson company]" would undoubtedly require the plaintiffs to dig out a tunnel 10 feet 6 inches by 11 feet 6 inches in dimensions, and any other provision affecting the physical characteristics of such tunnel no doubt would be applicable to and binding upon the plaintiffs, but I am not prepared to hold that the reference to the specifications as expressed in this context imports into the contract between the plaintiffs and the defendant, so as to make binding upon the plaintiff-subcontractors, who operate in a very small way, such sweeping and extraordinary powers as are exercisable by the city engineer. Only that part of the general specifications is to be read into the contract in question that relates to the specific purpose for which the same were referred to. Counsel have been unable to refer me to any authority in which all the general provisions of specifications forming part of a main contract became part of a subcontract, unless the latter by its terms made very clear the intention of the parties that all terms and provisions of the principal contract were to form part of the agreement between the principal contractor and the subcontractor. The general clauses under which the city engineer ordered a stoppage of the work and a change in the method of procedure are more in the nature of such provisions as one is likely to find in specifications furnished for the guidance of bidders for the original contract. It does not seem to me to be clear from the situation and the circumstances of the parties that it was their intention that, except in the restricted sense already mentioned, the specifications forming part of the original contract should be a part of the subcontract.

In *Chandler Bros. Ltd. v. Boswell*, [1936] 3 All E.R. 179, in the Court of Appeal, a somewhat similar problem was raised. In that case, however, the subsidiary document incorporated clauses which were to be found in the head contract but omitted a particular clause under which the owner's engineer had the



power to require the removal of a subcontractor. In these circumstances it was held that a term could not be implied in the subcontract giving the contractor power, as between him and the subcontractor, upon the giving of such a notice to put an end to the subcontract. It is clear that the judgment in that case is based upon its own particular facts and circumstances, nevertheless there is a very useful discussion of the principles applicable in such a case.

Reference may also be made to the judgment of the Supreme Court of Canada in *Tremblay v. Bouchard*, [1949] S.C.R. 552. In that case a subcontractor, who furnished stone to the principal contractor to be used in the building of a wharf, had knowledge of certain relevant terms of the contract between the main contractor and the Government. There was no direct reference, however, to that contract in the agreement between the contractor and the subcontractor. It was held that the contract for the furnishing of the stone was not subordinated to all the terms of the contract for the construction of the dock and that the subcontractor not having acquiesced in the suspension, and it not having been established that the execution of the work had been rendered impossible as required by the Civil Code of the Province of Quebec, the principal contractor was guilty of a breach of contract.

The Court would not be justified in so interpreting the contract under review as to hold that the plaintiffs are bound by all the terms of the head contract. The defendant was thoroughly familiar with all of its provisions and the plaintiffs had not even seen it, although no doubt they could have had access to it had they so desired. I have reached the conclusion that the contention that the defendant should be excused in the events which have happened, namely, the exercise of his power by the city engineer, cannot be maintained since that provision cannot be imported into this contract. It would have been quite simple for the parties, if they had so intended, to make provision in their agreement for what was to happen in the event of the engineer exercising his powers under the principal contract. For the reasons hereinafter stated in dealing with the defendant's third ground of defence, effect cannot be given to the alternative branch of the first proposition, based on an implied condition.

The second contention advanced by the defendant is also devoid of merit. While the agreement does not in express terms

bind the defendant to permit the plaintiffs to execute the work to be performed by them in accordance therewith, or bind the defendant to have it done within a defined period of time, the defendant by its conduct accepted the offer made by the plaintiffs and, having permitted them to enter upon the work so undertaken, was, in the absence of any special provision of the agreement, obliged to permit them to proceed in a reasonable manner and without any undue or unreasonable delay or suspension of their operations. This much must be implied in a contract of this nature, having regard to the position of the parties and all the surrounding circumstances, the contract being in the nature of a contract of service. If such an implication were not made, the contract would not have that efficacy which the parties must have intended it to have and there would be such a failure of consideration as cannot have been within the contemplation of the contracting parties.

On the third branch of the defence presented against the plaintiffs' claim, the defendant's contention should not prevail. The impossibility which arose here occurred subsequently to the formation of the contract and cannot avail the defendant unless its promise is either expressly or by implication conditional and not absolute, in which event, if the condition on which the obligation to perform it depends is not fulfilled, the promisor will be excused.

In *F. A. Tamplin Steamship Company, Limited v. Anglo-Mexican Petroleum Products Company, Limited*, [1916] 2 A.C. 397 at 403-4, Earl Loreburn declared the reasons upon which the doctrine of an implied term is based as follows: "... a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract . . . Sometimes it is put that performance has become impossible, and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state or things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them

I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted . . . Were the altered circumstances such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, 'If that happens, of course, it is all over between us'? What, in fact, was the true meaning of the contract?"

Another very clear exposition of the reasons on which the doctrine is based is contained in a passage in the speech of Lord Wright in *Luxor (Eastbourne), Limited et al. v. Cooper*, [1941] A.C. 108 at 137, [1941] 1 All E.R. 33, which reads as follows:

"The expression 'implied term' is used in different senses. Sometimes it denotes some term which does not depend on the actual intention of the parties but on a rule of law, such as the terms, warranties or conditions which, if not expressly excluded, the law imports, as for instance under the Sale of Goods Act and the Marine Insurance Act. The law also in some circumstances holds that a contract is dissolved if there is a vital change of conditions. But a case like the present is different because what it is sought to imply is based on an intention imputed to the parties from their actual circumstances.

"There have been several general statements by high authorities on the power of the Court to imply particular terms in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. But it is well recognized that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that 'it goes without saying,' some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties.



"These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts. But language is imperfect and there may be, as it were, obvious interstices in what is expressed which have to be filled up. Is there then any reason in the present case for thinking that there is some defect in expression or something omitted because it seemed too obvious to express? I cannot find any such reason."

I am unable to accept the submission of the defendant's counsel that the rights of the parties are to be governed by the principles enunciated in such cases as *Metropolitan Water Board v. Dick, Kerr and Company, Limited*, [1918] A.C. 119. In the latter case the work of construction was stopped by the Minister of Munitions acting under statutory powers. In the instant case the impossibility is not a natural or legal one but merely a relative impossibility which arose out of the defendant's own agreement with the City and it was its own fault if it ran the risk of undertaking to perform an impossibility. Moreover, the defendant had it within its power to guard against that risk in its contract with the plaintiffs, but omitted to do so. There is nothing in the circumstances of this case that can be said to require the Court to imply a term which, in the events that occurred subsequently to the formation of the contract, excuses performance thereof by the defendant in order to give effect to what the tribunal ought to regard as the real intention of the parties. The general manager of the defendant corporation stated that he had tunnelled approximately 3,745 feet in constructing the shafts on the upper level without running into the situation which was encountered in the portal shaft, and it is a reasonable inference, therefore, that he never contemplated the difficulty which later arose and that he accordingly thought it safe to proceed as he did without providing for any modification or qualification of the plaintiffs' rights in such circumstances as later developed. This reasoning applies with equal force to the alternative branch of the defendant's first contention based upon an implied term of the contract.

The plaintiffs are therefore entitled to succeed. As previously mentioned, they are claiming by way of damages only such an amount as they might have earned under the contract up to the 28th April 1952. The evidence presented on the issue of damages was not as complete as could be desired but, in the light of the

experience of the parties in connection with the operations carried on by them in February and March, and taking into account the possibility that the plaintiffs might have made better progress after the ground had become drier, I am inclined to the view that if their work had not been interrupted during the period between the 18th March and the 28th April 1952 they would have earned the sum of \$1,000.

If either of the parties desires to pursue the matter of damages further and have more evidence adduced on that issue, that party may have a reference to the Local Master at Hamilton for that purpose but at his own risk as to costs. Subject thereto, I direct that judgment issue in favour of the plaintiffs for \$1,000 and costs. That amount would bring this action within the jurisdiction of the County Court but to my mind it was by no means clear that the plaintiffs ought to have chosen that forum. I therefore feel justified in awarding costs to the plaintiffs on the Supreme Court scale.

*Judgment for plaintiffs.*

*Solicitors for the plaintiffs: Marck and Marck, Hamilton.*

*Solicitors for the defendant: Trepanier, Hagey & Kneale, Hamilton.*

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[COURT OF APPEAL.]

**Regina v. Lake.**

*Criminal Law—Obtaining by Fraud, Deceit, etc.—Distinction from Theft—Intention to Part with Property—Intoxicated Person—The Criminal Code, R.S.C. 1927, c. 36, s. 444, as re-enacted by 1947-48, c. 39, s. 13.*

The offences of theft by a trick and obtaining by deceit, falsehood or other fraudulent means in some cases so nearly resemble each other as to create real difficulty in distinguishing between them. One distinction is that in theft the owner of the thing taken has no intention of parting with his property in it, whereas in the other offence the owner does intend to part with his property, but the money or chattel is obtained from him by an act of deliberate deception, practised with the object of gaining something of recognized value to the owner to his prejudice. *Heap v. Motorists' Advisory Agency, Limited*, [1923] 1 K.B. 577; *Whitehorn Brothers v. Davison*, [1911] 1 K.B. 463 at 479, applied. Clearly a taking with the consent of the owner is not theft, but it is equally clear that if the owner is an imbecile or is in a completely drunken state he is incapable of giving consent, which requires sufficient capacity to perform an operation of the mind. *Rex v. Wallace* (1915), 8 Alta. L.R. 472, applied.

*Evidence—Circumstantial Evidence—Proper Direction to Jury as to Effect of Evidence—Necessity for Clear Direction that Evidence, to Support Conviction, Must be Consistent only with Guilt.*

It is misdirection to tell a jury, in discussing the effect of circumstantial evidence, that if the circumstances are equally consistent with innocence as with guilt they should acquit, but that otherwise they should convict, or to suggest to them that they should convict unless they are convinced that the circumstances are consistent with the accused's innocence, or, if the circumstances are consistent with guilt, unless there is "one factor which steps out and says you cannot find this man guilty". Such an instruction is contrary to the well-established rule as to the burden on the Crown to prove the accused guilty beyond a reasonable doubt, and will necessitate a new trial. The accused is entitled as of right to the verdict of a jury properly instructed, and it is not for a Court of Appeal to speculate as to the possible or probable impression left on the jury's minds. *Latour v. The King*, [1951] S.C.R. 19; *Rex v. Philbrook*, [1941] O.R. 352, applied.

*Criminal Law — Appeals from Conviction — Misdirection — Effect of Failure to Object at Trial.*

The fact that counsel for the accused at the trial did not object to a passage in the trial judge's charge is not necessarily fatal to his right to appeal on the ground that that passage constitutes misdirection. If the Court of Appeal is of opinion that any injustice may possibly have resulted it is its duty to interfere and, if necessary, direct a new trial. *Rex v. Recalla*, [1935] O.R. 479 at 485, applied.

AN APPEAL from a conviction in the Court of General Sessions of the Peace for the County of Carleton.

14th October 1953. The appeal was heard by PICKUP C.J.O. and J. K. MACKAY and F. G. MACKAY JJ.A.

G. A. Martin, Q.C., for the accused, appellant: 1. On Green's own story there is no evidence of deceit, falsehood or other fraudulent means. I concede that the jury must have found that the accused obtained this cheque when Green was in such a condition that he did not know what he was doing. But even if this finding is supported by the evidence (and my submission is that it is not) the offence would be theft rather than fraud under s. 444 of The Criminal Code, R.S.C. 1927, c. 36, as re-enacted by 1947-48, c. 39, s. 13. "Fraudulent means" in the section must be construed as *ejusdem generis* with "deceit" and "falsehood": Tremear's Annotated Criminal Code, 5th ed. 1944, p. 499, referring to *Rex v. Sinclair* (1906), 7 Terr. L.R. 424, 12 C.C.C. 20. One cannot deceive a man who is unconscious.

Tremear, *op. cit.*, at p. 397, states the distinction between theft and obtaining by false pretences, to which an offence under s. 444 is cognate. [PICKUP C.J.O.: Your argument assumes that Green was so far under the influence of liquor that he did not know what he was doing. It may be that he knew what he was



doing, but was intoxicated to such an extent that he did not fully appreciate the nature of his act. In that case it would not be theft, would it?] I submit that in that case there would be no offence at all, because the explanation may be merely that intoxication stimulated Green to be over-generous.

2. There was serious misdirection of the jury as to the effect of circumstantial evidence. The trial judge suggested that the accused must convince them that the circumstances were consistent with his innocence and that the jury should convict unless the circumstances were equally consistent with innocence as with guilt.

3. Inadmissible evidence was adduced by the Crown in chief as to the accused's previous record. There was also highly improper cross-examination of the accused.

*W. B. Common, Q.C.*, for the Attorney-General, respondent: There is a dearth of authority on s. 444 in its present form. The question of deceit must be viewed in the light of the whole transaction. Green was deceived as to the nature of his visit to the accused's house, as to the reason for the accused's hospitality, and as to the nature of the transaction entered into by him with the accused. [*F. G. MacKAY J.A.*: Can we assume that there was deception? The only evidence by Green is that he was drunk.] The accused swore that this was a perfectly legitimate and honest business transaction, which is wholly inconsistent with Green's evidence.

2. I concede that the trial judge misdirected the jury as to circumstantial evidence. But he had earlier instructed them perfectly properly as to the burden on the Crown, and the doctrine of reasonable doubt. No objection was taken at the trial to this part of the charge. I ask the Court to dismiss the appeal notwithstanding this misdirection, under s. 1014(2). The jury, had they been properly charged, could have come to no other conclusion, because the question was only whether or not they should believe the accused's evidence.

3. I know of no case in which a new trial has been granted because of improper or inflammatory remarks by Crown counsel in the course of the trial.

*G. A. Martin, Q.C.*, in reply: The word "defraud" is defined in *Rex v. MacDonald*, 19 M.P.R. 237, 88 C.C.C. 358, 3 C.R. 259. There is no evidence here of any deceit, which is essential to constitute defrauding.

The fact that the trial judge charged the jury correctly in one part of his charge does not remove the effect of the misdirection in a later part of his charge: *Taylor v. The King*, [1947] S.C.R. 462, 89 C.C.C. 209, 3 C.R. 475, [1948] 1 D.L.R. 545; *Latour v. The King*, [1951] S.C.R. 19, 98 C.C.C. 258, 11 C.R. 1, [1951] 1 D.L.R. 834.

The fact that no objection was taken at the trial is not necessarily fatal when there has been a serious error in law: *Rex v. Recalla*, [1935] O.R. 479, 64 C.C.C. 276, [1935] 4 D.L.R. 353.

*Cur. adv. vult.*

17th November 1953. The judgment of the Court was delivered by

J. K. MACKAY J.A.:—The appellant was convicted on the 4th February 1953 in the Court of General Sessions of the Peace at Ottawa, by His Honour Judge A. Gordon McDougall and a jury on an indictment alleging that “he on or about the 18th day of September, in the year of our Lord one thousand nine hundred and fifty-two, at the Township of Nepean, in the County of Carleton, did unlawfully, by deceit or falsehood or other fraudulent means, defraud one William Green of the sum of \$2,500.00 contrary to Section 444 [as re-enacted by 1947-48, c. 39, s. 13] of the Criminal Code”, and sentenced to a term of three years in Kingston Penitentiary. From that conviction he has appealed to this Court, and in his notice of appeal, and in the argument of his counsel before this Court, he has raised certain questions of law.

The grounds relied on by counsel for the appellant are:

1. If the accused procured a cheque from the complainant when the complainant was so intoxicated as not to know what he was doing, the offence, if any, was theft and not fraud.
2. The learned trial judge in his charge to the jury misdirected the jury on the burden of proof.

The facts briefly are as follows:

On or about the 18th September 1952 the appellant, R. A. Lake, came to the home of the complainant William Green and in the course of the afternoon a bottle of rye whisky was consumed, largely by Green, some other liquor being consumed by Lake and one Stoneburner. Later that afternoon the appellant asked Green to go with him for a drive in the appellant's truck,

which invitation Green accepted. Green says that shortly afterwards, in the course of an hour or more, he "passed out" and that when he awoke some two days later he was in a half-dazed condition in his own home. Green further says that on becoming aware of his whereabouts he put his hand in his pocket to get some money and pulled out a promissory note. On the top of this promissory note, ex. 1, is marked "Due 1965 \$2500.00. Interest 3%", and the body reads as follows: "Ottawa, Ont. Sept. 18, 1952. 13 years after date I promise to pay to the order of Wm. Green, Richmond, Ontario, at the Bank of Nova Scotia, here, the sum of Two Thousand Five Hundred — — 00/100 Dollars with interest at 3% per annum, as well after as before maturity. Value received. R. A. Lake." On the back of this note are stamps, one 4-cent stamp and two 1-cent stamps and also the words: "Interest to be paid yearly at 3 per cent on the 1st of Sept. each year. Amount to be paid off at any time before expiring date if I wished it".

On the same day a cheque was apparently signed, dated 18th September 1952 and reading as follows: "No. Savings 1164, The Bank of Toronto, Union Station. Pay to R. A. Lake or Order, \$2,500.00. Two thousand Five Hundred Dollars." This cheque was cleared through the Bank of Toronto on 19th September 1952, and is stamped: "Transit No. 356 Pay to the order of Any Bank, Banker or Trust Co. Sep 19 1952 Prior endorsements guaranteed The Bank of Toronto, Ottawa South Branch, Ottawa, Ontario." "The Bank of Toronto Cleared, Sep. 22 1952 Second Teller, Ottawa South." This cheque is endorsed "R. A. Lake" and was marked as ex. 2.

In the course of a few days Green became aware of the fact that the amount of \$2,500 had been debited to his bank account and on finding out that a cheque for that amount had been honoured by the bank and paid to Lake, he immediately laid an information and the appellant was arrested.

The evidence of Green is that he has no knowledge whatsoever of the execution of the cheque or of the note, but he admits that the signature on the cheque may be his.

The appellant in evidence says the cheque was given to him by Green as a loan and that he gave a note to Green and that Green said to the appellant "Make out the note to your [appellant's] satisfaction", "that whatever suited me suited him" and



that "he might just as well lend me the money as have it sit there, and then he would have nothing to worry about".

As to the first ground of appeal, it is not the responsibility of the Court to say how or under which section or sections of The Criminal Code a charge, information or indictment should be laid. That is the sole responsibility of the Crown and is entirely without the realm and scope of the Court.

In view of the fact that on other grounds there must be a new trial, it is unnecessary, and perhaps inexpedient, that the Court should make a finding on this ground of appeal. It may, however, be in order to enunciate some principles and quote some authorities referable thereto. It is plain that the offence of larceny or theft by a trick in some cases so nearly resembles that of obtaining by fraudulent means, deceit or falsehood as to create real difficulty in distinguishing one from the other. However, one intelligent distinction is: In theft the owner of the thing stolen has no intention to part with his property therein to the person taking it, while in the case of deceit, falsehood or other fraudulent means the owner does intend to part with his property in the money or chattel, but it is obtained from him by an act of deliberate deception, practised with the object of gaining something of recognized value from the owner to his prejudice: *Heap v. Motorists' Advisory Agency, Limited*, [1923] 1 K.B. 577; *Whitehorn Brothers v. Davison*, [1911] 1 K.B. 463, per Buckley L.J. at p. 479. Clearly a taking with the consent of the owner is not theft since it may not be either fraudulent or without colour of right, but it is surely equally clear that if the owner is an imbecile or is in a completely drunken state he is incapable of giving consent because the giving of consent implies sufficient capacity to exercise an operation of the mind, which an imbecile or one in a completely drunken condition is incapable of doing: *Rex v. Wallace* (1915), 8 Alta. L.R. 472, 24 C.C.C. 95, 8 W.W.R. 671, 24 D.L.R. 825, per Harvey C.J.A.

As to the second ground of appeal, namely, that the learned trial judge in his charge to the jury misdirected them on the burden of proof: Shortly after the opening of his charge the learned trial judge said:

"Now, in the consideration of this case and of that charge you must always bear in mind as counsel have told you that the Crown brings a man before the Court, charges him, and they must prove the case. The old maxim of British justice that a

person is innocent until proven guilty, well, that still holds good. The Crown must bring in evidence, produced before you to satisfy you that they have proven their case against the man. The man does not have to come in here and prove his innocence. The Crown must prove his guilt, and the Crown must prove it beyond a reasonable doubt. The burden of proof is on the Crown, and they must carry it to the extent that it is beyond a reasonable doubt.

“Now, don’t get frightened by the words reasonable doubt. It is purely a matter of your own judgment. If you have some doubt you say is this an honest reasonable doubt or just something I have conjured up in my mind? Is it an honest doubt, is it a doubt that remains in the mind of an honest jurymen having due regard to the sanctity of his oath? Whether after an honest consideration of the evidence there remains in his mind an honest doubt. That has been defined in other ways, but I just leave it to you in that way. Consider all of the evidence, and you say has the Crown proven this beyond a reasonable doubt, and then you say, if you have a doubt, is that an honest doubt, or something I have just picked at? I don’t think I can put it any plainer than that.”

In the opinion of the Court no exception can be taken to this part of the charge which is, in our opinion, strictly in conformity with the law. Later in his charge the learned trial judge said:

“I must warn you of one thing, if after you appraise and weigh all these facts and circumstances you come to the conclusion that they are consistent with the innocence of Lake as well as guilt—if you are convinced they are consistent with his innocence then you must acquit him. Then if you do not think that, you must find they are consistent with guilt. That is to say, is there any one factor which steps out and says you cannot find this man guilty.”

This paragraph in the charge of the learned trial judge is not clear. It may have conveyed to the minds of the jury that to acquit they must be *convinced* that the facts were consistent with the innocence of the accused, but that if the facts were consistent with guilt, they should convict unless there was “one factor which steps out and says you cannot find this man guilty”. This, in the opinion of the Court, would be misdirection in that

it qualifies the clear direction as to the burden of proof beyond reasonable doubt stated earlier in the charge of the learned trial judge.

If he had said no more on this point, the charge, as a whole, might make it clear that no substantial wrong or miscarriage of justice had occurred, and the error might have been governed by s. 1014(2) of The Criminal Code, R.S.C. 1927, s. 36. But later on in his charge the learned trial judge said: "Now, I have tried to go over them to give you the relationship between the parties, what security he got for his money, what it means to him in later life, the fact that the accused immediately got the cheque marked, Green going to the police; are those consistent with the innocence of Lake, or are they consistent with the guilt of Lake? If they are equally consistent with innocence, acquit him; if not you must find him guilty."

These were almost the last words spoken to the jury, and the very last words concerning the law, before they retired to consider their verdict.

In the opinion of the Court the words above quoted are fundamentally wrong in law and serious misdirection. Therefore, we cannot, with any reasonable degree of abiding assurance, conclude that the jury had a correct appreciation and understanding of this all-important principle. The accused is entitled as of right to the verdict of a jury properly instructed, and it is not for a Court of Appeal to speculate as to the possible or probable impression left on the minds of the jury: *Latour v. The King*, [1951] S.C.R. 19, 98 C.C.C. 259, 11 C.R. 1, [1951] 1 D.L.R. 834; *Rex v. Philbrook*, [1941] O.R. 352, 77 C.C.C. 26, [1942] 1 D.L.R. 627.

It was drawn to the attention of the Court by the learned counsel for the Crown that no objection was taken to this part of the charge by defence counsel. It is true that no objection was taken, but this is not necessarily fatal. "If the Court should be of opinion that any injustice might possibly have resulted, it is our duty to interfere and, if necessary, direct a new trial": per Middleton J.A. in *Rex v. Recalla*, [1935] O.R. 479 at 485, 64 C.C.C. 276, [1935] 4 D.L.R. 353.

The appeal should be allowed, the verdict should be set aside and a new trial should be ordered.

Counsel for the appellant took exception to certain comments made during the course of the cross-examination of the appellant



which appear at various parts of the evidence. Reference is made to only one of such comments:

“Q. You have got fifteen thousands dollars’ worth of property, surely a bank would have loaned you this amount, of course, not for thirteen years? A. I have a friend I can go and get whatever I like at any time without any securities.

“Q. Listen, if you can convince this Court and this jury that you, an intelligent man like that, like you are, after going through so many business transactions, if you can convince the jury of that, and that you didn’t try to put one over on this old gentleman, try to do it.

“MR. BLEAKNEY: Your Honour, I object to any suggestion by my friend that there is any onus on the defence to convince the jury of anything. That duty rests entirely with my friend.

“MR. MERCIER: Well, well, we learn something every day.

“MR. BLEAKNEY: Well, it is time you learned that, that is a very improper suggestion to leave with the jury, that there is any onus whatever on the accused.

“HIS HONOUR: That will be dealt with thoroughly in the charge to the jury.”

Such comments by counsel, and especially by Crown counsel, cannot be said to be in conformity with well-recognized principles of conduct in the trial of criminal cases and are, in the opinion of the Court, most unfortunate.

*New trial ordered.*

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[COURT OF APPEAL.]

**McColl v. McColl and Likou.**

*Divorce and Matrimonial Causes—Alimony and Maintenance—Powers of Court—Ordering Sum to be Secured—Absence of Power to Order Securing of Weekly Payments for Maintenance—The Matrimonial Causes Act, R.S.O. 1950, c. 226, ss. 1, 2.*

The Court has no power, in an action for divorce, to order a weekly payment for support and maintenance, awarded to the wife, to be secured on the husband’s lands.

Sections 1 and 2 of The Matrimonial Causes Act are substantially identical in language with corresponding English legislation, and English decisions may therefore be used as a guide in interpreting them. The rules to be deduced from an examination of the sections, and of *Shearn v. Shearn*, [1931] P. 1; *Mills v. Mills*, [1940] P. 124; *Barker v. Barker*, [1952] P. 184, and *Medley v. Medley* (1882), 7 P.D. 122, may be summed up as follows:

1. The Court has power, under s. 1, to order a gross or annual sum to be secured to a wife. There is no power to order such a sum to be paid to her.

2. The Court may order, in addition to or in substitution for an order to secure a lump sum, that a monthly or weekly sum be paid to a wife for her support and maintenance. The Court cannot order this sum to be secured.
3. The Court may vary an order for the payment of a monthly or weekly sum for support and maintenance, but cannot vary an order securing a gross or annual sum.

AN APPEAL by the defendant husband from the judgment of Wilson J., in a wife's action for divorce, in so far as it ordered the securing on the appellant's lands of a weekly sum ordered to be paid to the plaintiff for her support and maintenance.

12th November 1953. The appeal was heard by PICKUP C.J.O. and HOGG and F. G. MacKAY JJ.A.

*D. R. Walkinshaw, Q.C.*, for the defendant McColl, appellant: The questions involved in this appeal are whether the trial judge had a right in law to charge our lands with the payment of the weekly sum awarded by him as maintenance, and whether the judgment could properly be registered under s. 77 of The Judicature Act, R.S.O. 1950, c. 190. My submission is that the Court is entitled to require the securing of a gross or annual sum, under s. 1 of The Matrimonial Causes Act, R.S.O. 1950, c. 226, but not of a weekly sum under s. 2. Section 1 in effect takes a piece of the husband's property and sets it aside for the wife, so that she is entitled to look to that one piece of property only. If the plaintiff accepts relief under s. 1 she can, together with an order for security, have the security apportioned in weekly or monthly instalments, but if she elects to take a weekly or monthly payment, under s. 2, she cannot demand that security be given for payment of this sum. There is no power to order that payments under s. 2 be secured: *Shearn v. Shearn*, [1931] P. 1, cited with approval in *Minaker v. Minaker and Medlan*, [1949] O.W.N. 781. The plaintiff in this action did not ask, in her prayer for relief, for a judgment under s. 1; she asked for a weekly payment. This being so, I submit that the trial judge had no power to give her security under s. 1 while giving judgment under s. 2. [HOGG J.A.: Section 1 says nothing about maintenance.] No. [HOGG J.A.: There is no power to grant alimony under the Act, except interim alimony.] The term "interim alimony" implies payment up to the date of the judgment absolute. [PICKUP C.J.O.: The plaintiff does not seem to have asked for the judgment she was given.] [HOGG J.A.: The fact that she claimed maintenance implied a weekly or

monthly sum, not a gross sum.] Yes. If a plaintiff elects to claim relief under s. 2 she must abide by that, and cannot claim security under s. 1.

Section 77 of The Judicature Act provides for registration of a judgment for alimony, but does not permit the registration, against the husband's lands, of a judgment for maintenance: *MacDonald v. MacDonald*, [1952] O.R. 754, [1952] 4 D.L.R. 457.

The trial judge said in his reasons for judgment that he was doing something that was not commonly done, and I submit that he had no power to do it.

*W. A. Sutherland*, for the plaintiff, respondent: My submission is that maintenance may be secured, and that the learned trial judge had power to give the judgment he did give. He could not make an order securing alimony, but he could make an order securing maintenance in instalments. Relief was sought under s. 1 of The Matrimonial Causes Act. It is clear under *Hanley v. Hanley et al.*, [1948] O.R. 827, [1948] 4 D.L.R. 741, affirmed [1949] O.R. 163, [1949] 2 D.L.R. 72, that the Court can make an order securing an annual sum, to be paid in instalments.

There are two types of order, an order to pay and an order to secure, and one can be made without the other or both can be made together: *Homuth v. Homuth et al.*, [1943] O.W.N. 290, [1943] 3 D.L.R. 603, affirmed [1943] O.W.N. 570, [1943] 4 D.L.R. 428. *Minaker v. Minaker and Medlan, supra*, shows that either order may be made in the proper circumstances. [HOGG J.A.: The Act expressly says so.]

We registered the certificate of our judgment under s. 1(d) of The Registry Act, R.S.O. 1950, c. 336. [PICKUP C.J.O.: You must first have a charge affecting the land before you can do that. As I see it, this judgment in its present form should not be registered.] I refer to ss. 31 and 41 of The Registry Act.

*D. R. Walkinshaw, Q.C.*, in reply: *Hanley v. Hanley et al., supra*, is exactly what I have been arguing for. If a plaintiff asks for an order under s. 1 she can also come within s. 2, but if she asks for an order under s. 2 she cannot claim the benefit of s. 1.

*Cur. adv. vult.*

19th November 1953. The judgment of the Court was delivered by



Hogg J.A.:—On the 1st May 1953 judgment was pronounced by Mr. Justice Wilson in this action whereby he granted a decree nisi dissolving the marriage of the plaintiff, Grace McColl, to her husband, Archibald McColl, on the ground of his adultery with the co-defendant and, in addition, the plaintiff was awarded a weekly sum payable to her by the defendant husband as alimony until the judgment was made absolute, as well as the sum of \$10 payable each week by the said defendant to the plaintiff for her maintenance. The judgment provides that the sum payable each week for the support and maintenance of the plaintiff shall be secured as a charge on certain farm lands, the property of the defendant husband.

Those parts of the judgment as entered which are material for the purposes of this appeal are:

“3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant Archibald McColl do pay to the plaintiff for her maintenance during their joint lives so long as the plaintiff remains chaste or until the plaintiff remarries or until this Court otherwise orders, the sum of \$10 a week on Saturday of each week commencing on the first Saturday after the granting of the judgment absolute.

“4. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that past due instalments of such interim alimony or such maintenance bear interest at the rate of 5% per annum payable annually.

“5. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the plaintiff is entitled to security charged against the farm hereinafter mentioned for payment of maintenance pursuant to the provisions of paragraph numbered 3 hereof and that it be referred to the Master at Toronto to ascertain and settle the form of the said security against the farm lands and premises known and described as:

“ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the Township of Caledon in the County of Peel and being composed of the north half of Lot No. 3 in the First Concession west of Hurontario Street in the said Township of Caledon.”

In pursuance of para. 5 of the judgment, the plaintiff proceeded to register a certificate of the judgment in the Registry Office for the Registry Division of the County of Peel.

The defendant McColl appeals to this Court for an order varying the aforesaid judgment so that that part of the order securing the weekly sum granted to the plaintiff as maintenance, and making it a charge upon certain lands of the defendant husband, be struck out from the judgment. The appellant also requests an order vacating the registration as aforesaid of the judgment. It is contended in support of the appeal that the Court has not the power to make a sum payable for the support and maintenance of the plaintiff a charge against the lands of the appellant. The issue resolves itself into an inquiry into the construction and the effect of certain of the provisions of The Matrimonial Causes Act, R.S.O. 1950, c. 226. The power given to the Court to grant a sum to be secured to a wife in an action for divorce and to direct a weekly or monthly sum to be paid for her support and maintenance is found within the ambit of the aforesaid statute.

Section 1 reads: "In any action for divorce or to declare the nullity of any marriage, the court may order that the husband shall secure to the wife, unless she has been guilty of adultery, such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, and to the ability of the husband and to the conduct of the parties, may be deemed reasonable and may suspend the pronouncement of the judgment absolute until all necessary deeds and instruments have been executed."

And s. 2(1) is as follows:

"In addition to or in substitution for an order under section 1 the court may direct the husband to pay to the wife, unless she has been guilty of adultery, during the joint lives of the husband and wife and so long as she remains chaste such monthly or weekly sum for her support and maintenance as the court may think reasonable, provided that,

"(a) if the husband after any such order becomes, from any cause, unable to make the payments, the court may discharge or modify the order or temporarily suspend the order in whole or in part and may subsequently revive it in whole or in part as may be deemed proper:

"(b) if the means of the husband shall at any time after the making of any such order be increased, the court may, if it is deemed proper, increase the amount payable thereunder;

“(c) such payments shall cease on the wife marrying again.”

The provisions of the English statutes, The Judicature (Consolidation) Act, 1925, c. 49, and The Matrimonial Causes Act, 1950, c. 25, are substantially identical in their terms with those of the Ontario Act in so far as they enable the Court, in an action for dissolution of marriage, to secure a gross or annual sum of money to the wife, and in so far as they enable the Court, in addition to or in substitution for such order, to direct the husband to pay to the wife a monthly or weekly sum for her support and maintenance. As a consequence, the decisions of the Courts in England which interpret the aforesaid statutes serve as a guide in an endeavour to ascertain the meaning of the similar provisions in our own Act.

The English Matrimonial Causes Act, 1857, c. 85, by s. 32, empowered the Court to order a gross or annual sum to be secured to a wife in an action for divorce, but there was no provision in this statute enabling the Court to order the payment of a weekly or monthly sum to the wife for her maintenance. This latter power was conferred upon the Court by The Matrimonial Causes Act, 1866, c. 32, s. 1. In The Judicature (Consolidation) Act, 1925, as amended, s. 190(1) provides, in terms similar to those of the Act of 1857, for an order securing a lump sum to a wife, and by s. 190(2) for an order that the payment of a weekly or monthly sum for maintenance and support, to be made in addition to or instead of an order to secure a gross sum to the wife. This statute gave power to the Court to vary an order for the payment of a weekly or monthly sum for maintenance and support. The English Matrimonial Causes Act, 1950, provides, in substantially the same terms as those of the former statutes, for an order securing a gross sum and for an order for the payment of a monthly or weekly sum for maintenance to a wife. It also, by s. 28, enables the Court to discharge or vary either an order made to secure a gross amount or an order for the payment of a weekly or monthly sum for maintenance. Sections 1 and 2 of the Ontario Matrimonial Causes Act, so far as relevant, are in substantially the same terms as subss. (1) and (2) of s. 19 of the English Act of 1950, but the Court in this Province is not given power to vary an order securing a gross or annual sum to a wife. In the Ontario Act, by the authority of paras. *a* and *b* of s. 2(1), only the



order for the payment of a weekly or monthly sum for support and maintenance may be varied.

In *Shearn v. Shearn*, [1931] P. 1, the provisions of s. 190(2) of The Judicature (Consolidation) Act, 1925, and an amendment thereto were considered by Hill J., who concluded that the Court, although it could vary or modify from time to time the order to pay a weekly or monthly sum for maintenance and support, could not vary an order to secure to the wife a gross or annual sum of money, nor could the Court turn an order to secure a sum of money into an order to pay a weekly or monthly sum. The learned judge said at p. 4:

"The order under s. 190, sub-s. 1, is not an order to make periodical payments and secure the payments: it is an order to secure and nothing else. Under it the only obligation of the husband is to provide the security; having done that, he is under no further liability. He enters into no covenant to pay and never becomes a debtor in respect of the payments. The wife has the benefit of the security and must look to it alone; if it ceases to yield the expected income she cannot call upon the husband to make good the deficiency . . .

"The order under sub-s. 2 is not an order to secure—it is an order to make periodical payments. There is no power under sub-s. 2 to order that these payments be secured. If the husband's means increase, the periodical payments can be increased. But however much his ability to secure increases, he cannot under sub-s. 2 be ordered to secure."

In *Mills v. Mills*, [1940] P. 124, [1940] 2 All E.R. 254, upon a consideration of the same statute, it was held that the Court had no power, in an action for divorce, to order a husband to pay a lump sum to the wife by way of support and maintenance. At p. 130 Sir Wilfrid Greene M.R. said:

"The order on the face of it also purports to direct payment of a lump sum. That payment is something which the Court had not jurisdiction in itself to order, because the jurisdiction of the Court, so far as relevant, is confined to securing, under sub-s. 1 of s. 190 a gross or annual sum, or under sub-s. 2 ordering the payment of a periodical sum to the wife.

"It is settled that the Court has not power to order payment to the wife out and out of a lump sum."

In *Barker v. Barker*, [1952] P. 184, [1952] 1 All E.R. 1128, Jenkins L.J. commented upon the significance which had always

been given to the word "secure" in the several statutes which authorized the Court in an action for divorce to secure to the wife a sum of money, and was of the opinion that since The Matrimonial Causes Act, 1857, the word "secure" had been treated as inconsistent with a covenant for payment. He quoted the words of Lindley L.J. in *Medley v. Medley* (1882), 7 P.D. 122, where that learned lord justice said: "I think it is clear that [the word 'secure'] does not include payment, but that the sum gross or annual was to be secured so as to provide a fund for the wife."

With the greatest respect for the opinion of the learned trial judge, a judge of much experience, I think it was a misconception on his part of the extent of the power given to the Court by The Matrimonial Causes Act to conclude that the weekly sum of \$10 directed to be paid by the defendant husband for the maintenance of his wife could be secured by a charge upon the property of the said defendant. The plaintiff wife in her pleading claimed interim alimony and maintenance for herself. The learned trial judge awarded her a weekly sum to be paid by her husband for her support and maintenance as provided by s. 2 of The Matrimonial Causes Act. He did not grant her a gross sum to be secured as authorized by s. 1. There is, as has been pointed out, no power in the Court to secure this weekly payment by making a charge on the husband's lands.

The rules to be deduced from an examination of the terms of the Ontario statute and from the aforesaid decisions may be summed up as follows:

(1) The Court has power to order a gross or annual sum to be secured to a wife. There is no power in the Court to order such gross or annual sum to be paid to a wife.

(2) The Court may order, in addition to or in substitution for an order to secure a lump sum, that a monthly or weekly sum be paid to a wife for her support and maintenance. The Court cannot order this sum to be secured.

(3) The Court may vary an order for the payment of a monthly or weekly sum for support and maintenance but the Court cannot vary an order securing a gross or annual sum.

The judgment will be varied by striking out para. 5 of the same, whereby it is ordered that the plaintiff is entitled to security as a charge against the lands in question for payment of maintenance.

An order for the payment of maintenance to a wife in pursuance of s. 2 of The Matrimonial Causes Act is not one that may be registered against the land of the husband: *MacDonald v. MacDonald*, [1952] O.R. 754, [1952] 4 D.L.R. 457. The certificate of the judgment herein must be vacated. There will be no order as to the costs of the appeal.

*Appeal allowed without costs.*

*Solicitors for the defendant husband, appellant: Roebuck, Walkinshaw & Trotter, Toronto.*

*Solicitor for the plaintiff, respondent: Goldwin C. Elgie, Toronto.*

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[FERGUSON J.]

### Newell v. Morrison et al.

*Highways—Municipal Liability for Upkeep—Accumulation of Ice and Snow in Winter—Much-travelled Road—Sufficiency of Precautions Taken—The Municipal Act, R.S.O. 1950, c. 243, s. 453(1),(2)—Applicability of The Negligence Act, R.S.O. 1950, c. 252, s. 2(1).*

In such a district as Ontario, where it is usual to have frequent snows and thaws, everyone knows the danger of ice and snow on a highway, and one who travels on the roads in winter must assume the risk of encountering snow and ice. It would be unreasonable to expect a municipality to protect motorists from all snow and ice on highways, and it is not bound in law to do so. On the other hand, when a busy thoroughfare runs through an urban community and a section of the road becomes a peculiar menace to the traveller, greater than that generally to be anticipated, that excessively dangerous section is out of repair and the municipality will be liable under s. 453 of The Municipal Act. It must be a question of fact in each particular case whether the road is out of repair.

*Foley et al. v. The Township of East Flamborough* (1897), 29 O.R. 139; *Cranston v. Town of Oakville* (1916), 10 O.W.N. 175, 315; 66 S.C.R. 630; *Greer v. Township of Mulmur* (1926), 59 O.L.R. 259; *Mighton and Mighton v. The County of Wellington*, [1953] O.R. 290, affirmed [1953] O.W.N. 958, considered and applied; *Edgeworth v. The King*, [1937] O.R. 721, distinguished.

If an accident is caused as the result of the negligence of a motorist, driving on a highway in a condition of non-repair, the injured person is entitled to recover from both the motorist and the municipality, s. 2(1) of The Negligence Act being applicable to the situation. *Bissell v. Township of Rochester* (1930), 65 O.L.R. 310, applied; *Doughty et al. v. Township of Dungannon*, [1938] O.R. 684, held inapplicable.

*Highways—Action against Municipality for Non-repair—Notice of Injury and Claim—Sufficiency—Two Claimants—The Municipal Act, R.S.O. 1950, c. 243, s. 453(5).*

N was injured by M's automobile, which had skidded on a very slippery place in the roadway. N. duly gave notice of his injury to the municipality, as required by s. 453(5) of The Municipal Act, claiming that "the accident was due in whole or in part to the non-repair of the



highway". N later sued both M and the municipality, and M made a claim over against the municipality. It was argued that M's claim against the municipality was barred because he had given no notice. *Held*, in the circumstances, N's written notice was clearly a notice that M's car had struck N because of the non-repair of the highway, and was therefore sufficient to satisfy the requirements of the statute as to notice of the injury and the claim by M.

AN ACTION for damages. The defendants were Harold Morrison, the County of York, and the Toronto and York Roads Commission.

5th to 9th October 1953. The action was tried by FERGUSON J. without a jury at Toronto.

*E. L. Sparling*, for the plaintiff.

*H. R. Rose, Q.C.*, for the defendant Morrison.

*F. J. Hughes, Q.C.*, and *J. D. Lucas*, for the other defendants,

27th November 1953. FERGUSON J.:—This action is brought by the plaintiff Robert E. Newell for damages for personal injuries sustained by him as a result of being struck by a motor vehicle owned and driven by the defendant Morrison on Danforth Road in the township of Scarborough in the county of York. Danforth Road is a main road running north and east off Danforth Avenue to the east of the city of Toronto. It intersects Kennedy Road and carries the traffic proceeding to the towns of Agincourt, Unionville and Markham. As I suppose almost everyone knows, Danforth Road was the first highway built into the town of York by the contractor whose name it bears, more than 150 years ago.

The accident occurred on 15th December 1951, at a point about one mile north of Danforth Avenue on a grade known as Bell's Hill. The plaintiff, who operates a garage a short distance from the scene, was driving southerly on Danforth Road at Bell's Hill about 10 p.m. when he met some traffic coming up the hill as he was proceeding down. He says the oncoming traffic forced him to the shoulder of the road and as he "whipped" back onto the road his car skidded on the icy surface, turned around and slid backwards down the hill and into the snow-filled ditch; the plaintiff's car came to rest facing in almost the opposite direction to that in which it had been proceeding before it went out of control. Danforth Road at this point runs almost north and south and the plaintiff's car came to rest facing north-west. The plaintiff then proceeded to clear the snow away from the wheels of his motor vehicle with a shovel which he carried with

him. He had just finished this operation, and was proceeding around the south side of his car to replace the shovel in the trunk, when the defendant Morrison's car, which was proceeding down the hill, skidded, went out of control, slid down the hill backwards, collided slightly with the plaintiff's car and knocked down the plaintiff and came to rest with the left rear wheel on the plaintiff's chest, severely injuring him. When Morrison's car came to rest it was to the south of the plaintiff's car, with its right front fender about 5 feet 2 inches south of the left rear fender of the plaintiff's car. The police were called and shortly after they arrived a third car slithered down the hill in much the same fashion as the other vehicles then in the ditch had done and slid backwards into the space between the plaintiff's car and Morrison's car. Shortly afterwards two other cars skidded on the hill but righted themselves and proceeded on their way.

If it was the condition of the road that caused Morrison's car to skid then it was the condition of the road that caused the plaintiff's damage.

All the evidence indicates that notwithstanding the fact that Danforth Road is a main thoroughfare, it had for some days been in bad condition with snow and ice, and I so find as a fact. I find that it had snowed on the morning of the accident, that during the day the weather moderated, there was some thawing on the hill which faces the south and it turned very cold in the evening, it being almost zero at the time of the accident, with the result that there was glare-ice on the pavement and icy ruts were formed at the sides of the pavement and particularly at the point where the cars slipped, as that point was not only on the slope but within a few feet of Mack Avenue which intersects Danforth Road at this point, making an obtuse angle on the north-west side which, according to the evidence, tended to create rough, deep, icy ruts in the snow. It was these icy ruts that caused Newell and Morrison to lose control of their cars and their evidence is in some measure supported by the police who witnessed the gyrations of the third, fourth and fifth cars.

The claim of the plaintiff against the defendants the municipal corporation and the roads commission, and also Morrison's claim for relief over against those defendants, are based on the wording of s. 453 of The Municipal Act, R.S.O. 1950, c. 243, which reads in part as follows:

“(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall, subject to the provisions of *The Negligence Act*, be liable for all damages sustained by any person by reason of such default.

“(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.”

The first objection is that the defendant Morrison's claim for relief over is barred by subs. 5, which requires notice of the claim and injury to be given to the corporation within ten days.

Notice was served on the defendant the County of York by the solicitor for the plaintiff on the 19th December 1951, in part as follows:

“The accident occurred on Saturday, December 15th, at about 11:00 p.m., and Mr. Newell while pedestrian on the roadway, in the act of shovelling snow from under his automobile, was struck by an automobile owned by Harold Morrison of 679 Mount Pleasant Road, Toronto, which automobile was proceeding down the hill. Mr. Newell's car was damaged and he suffered severe personal injury, including a broken arm and a broken hip. According to my instructions, the accident was due in whole or in part to the non-repair of the roadway (icy, unsanded surface).

“Please accept this as notice pursuant to the Statute that Mr. Newell intends to claim damages from you arising out of this accident.”

No notice was given to the corporation by the defendant Morrison, but the written notice of Newell is clearly a notice that the Morrison car collided with Newell because of the non-repair of the highway and therefore I am of the opinion that it was sufficient to satisfy the requirements of the statute, as to notice of the injury and the claim by Morrison.

The first question, of course, is whether the highway was in a state of non-repair. In determining whether a road is unsafe for travel, as was pointed out by Armour C.J. in *Foley et al. v. The Township of East Flamborough* (1897), 29 O.R. 139, regard must be had to the locality in which the road is situated in a city, town or village; whether it is required to be used by many or by few,



“to how long the particular road has been opened to travel, to the number of roads to be kept in repair by the township, to the means at its disposal for that purpose, and to the requirement of the public using the road.”

The particular section of the road where the accident occurred has been incorporated into the York County roads system and connects with Kennedy Road which runs in a northerly direction. The road is heavily travelled, a fact not only stated by the witnesses but amply demonstrated by the number of motor vehicles appearing in the photographs put in evidence by the defendants. It passes at this point through the well-populated part of the township of Scarborough which in this area is urban in character. Some evidence was given on behalf of the defendants as to the mileage of roads to be kept in repair by the County, but no evidence whatever was offered as to the financial ability of the defendants to keep all these roads in repair. I therefore assume that the defendants are well able financially and in all other respects capable properly to fulfil the obligation imposed upon them by The Municipal Act.

In *Cranston v. Town of Oakville* (1916), 10 O.W.N. 175. affirmed 10 O.W.N. 315; 66 S.C.R. 630, 39 D.L.R. 762, Hodgins J.A. stated the definition of want of repair as follows: “. . . it [is] sufficient for the plaintiff’s case if the evidence established such a want of repair as to render travel unsafe even though others may pass over the spot without an accident.”

That statement of the law has been accepted and restated in almost every case of non-repair since, including *Cotie and McGee v. The County of Renfrew*, [1950] O.R. 369 at 372, [1950] 3 D.L.R. 487, reversed on other grounds, [1951] O.W.N. 75, [1951] 1 D.L.R. 774.

In *Greer v. Township of Mulmur*, 59 O.L.R. 259 at 263, [1926] 4 D.L.R. 132, Masten J.A. agreed with the following statement of the law by Rose J., as he then was, that a *prima facie* case was made out when want of repair was shown: “The law, as I understand it, is that it is the duty of a municipality to keep its roads, or to use all reasonable efforts to keep its roads, in a reasonable state of repair. When it is shewn that a road is not in a reasonable state of repair and that damage has been caused by the want of repair, a *prima facie* case is established against the municipality. Confusion has arisen frequently by reason of the fact that the action of the municipality has been called neg-

ligent, and people have thought that it was for the plaintiff in such a case to establish negligence. That, as I say, is not what I understand the law to be. When want of repair is shewn, a *prima facie* case is made out; it is then for the municipality to shew that the want of repair existed notwithstanding all reasonable efforts on the part of the municipality to comply with the law."

A consideration of the character of the district, the fact that this was an unusually dangerous part of the road, the change in the temperature for more than seven hours before the accident, the amount of traffic, and all other matters, leads me to the conclusion that the plaintiff's case of want of repair is made out.

Has the municipality shown that the condition existed notwithstanding all reasonable efforts to comply with the law?

Shortly, the evidence cannot be said to show that the defendants made any efforts, reasonable or otherwise, to remedy the conditions on Bell's Hill. The road is a county road made part of the roads coming within the jurisdiction of the Toronto and York Roads Commission for maintenance. The County has made a loose arrangement with The Miller Paving Company Limited to sand the roads whenever sanding is required. Sanding may be ordered at any point by the county engineer, whose primary responsibility it is to order it done; but the Miller company under its verbal arrangement with the County, is expected to sand whenever necessary. The arrangement would seem to be entirely unsatisfactory from the public's point of view and would indicate that the corporation has entirely misconceived its obligations. The yard from which the Miller company obtains its sand is at the Rouge River, some miles east, while the office of the company is in down-town Toronto. No evidence was offered of any patrolling of the roads in the county, or of any system of ordering sanding to be done. That is understandable as counsel for the defendants relied on the statement of Fisher J.A. in *Edgeworth v. The King*, [1937] O.R. 721 at 729, [1937] 4 D.L.R. 136:

"There may be an obligation on municipalities to sand sidewalks covered with slippery ice in busy streets, but there is no such obligation on the part of the defendant or of municipalities for sanding highways."

The highway to which Fisher J.A. was referring was a very different road as regards location and traffic from the one I am

concerned with in this case. Not only was the road there in question outside town limits but steps had been taken by the municipality to warn motorists. Latchford C.J.A. found as a fact that the highway was not unsafe.

In *Mighton and Mighton v. The County of Wellington*, [1953] O.R. 290 at 300, [1953] 2 D.L.R. 419, affirmed [1953] O.W.N. 958, my brother Wilson, referring to the statement of Fisher J.A. in *Edgeworth v. The King*, just referred to, had this to say: “. . . in my view the opinion that municipalities are not obliged to sand highways conflicts in principle with the trend of the decisions. The duty of the municipality is to keep its highways open for reasonable and safe travelling, having regard to its financial resources and the volume of traffic, improving its highways and its maintenance, including winter maintenance, as wealth permits and travel demands. At points of special danger it must give special attention, and I think in proper circumstances, this may include sanding or other proper measures to make the highway safe within the limits of the principles already quoted.” I agree with that statement of the law and presumably it met with approval in the Court of Appeal as the appeal from Mr. Justice Wilson’s judgment was dismissed.

I express no opinion on the general liability of a corporation to sand its highways. That matter I deem not to be before me. Wilson J. expressed the opinion that the statement of Fisher J.A. in *Edgeworth v. The King* was *obiter* and against the trend of modern decisions. I express no opinion except that in a country such as this, where it is the usual thing to have frequent snows and thaws, everyone knows the danger of ice and snow on a highway and must travel on our roads in winter assuming the risk of encountering snow and ice. It would be unreasonable to expect a municipality, and in my view the municipality is not bound in law, to protect the motorist from all snow and ice on highways. But on the other hand, where a busy thoroughfare runs through an urban community and a section of the road becomes a peculiar menace to the traveller, in excess of that generally to be anticipated, that excessively dangerous section is, in my opinion, out of repair. It must be a matter of fact in each particular case whether the road is out of repair. In this case I am of the opinion that Bell’s Hill was out of repair, and the corporation has not discharged the onus on it of showing that it was out of repair without its negligence.



I deal now with the legal results flowing from the above facts.

Up to the point when Morrison's car collided with the plaintiff, the plaintiff had sustained no damage by reason of the condition of the road. It is argued by counsel for the defendant road authorities that there is no liability in law on them if there was negligence on the part of Morrison.

In the first place, I think s. 51 of The Highway Traffic Act, R.S.O. 1950, c. 167, applies. Between Newell and Morrison the onus is on Morrison, the driver of the car, to show that the accident occurred without his negligence. Morrison lived on Mount Pleasant Road, some miles away from the scene. He was familiar with the road but had not been over it for over a week and would not have known anything of the condition on Bell's Hill had it not been for the fact that he had a brother-in-law living a short way off Kennedy Road and had towed his brother-in-law's car home from O'Connor Drive and Coxwell Avenue by a northern route which led to the brother-in-law's house. After towing his brother-in-law's car he proceeded southerly along Kennedy Road and Danforth Road towards the city. The brother-in-law, who accompanied him, knew the condition of the hill as he had been over it daily and as recently as 6.30 a.m. on that day. He knew the road was in a dangerous condition and in consequence proceeded to warn Morrison. He performed such an impressive job of warning that Morrison, according to his wife, was "more or less creeping along at the top of the hill". Morrison admits, in fact emphasizes, the fact that he was warned. He says he was proceeding at the rate of 15 miles per hour, perhaps a little more, or, as he put it in his examination for discovery, "20 and less than 20 I was coming". On his examination for discovery, q. 79, he admitted the whole road was dangerous all the way.

In view of the warnings he admittedly received, and in view of his knowledge that "the whole road was slippery all the way down", I am not satisfied that the accident was not due to any negligence on the part of the defendant Morrison. I think he did not take sufficient heed of the warnings. Such a finding makes him liable to the plaintiff: *Shapiro et al. v. Wilkinson*, [1943] O.R. 806, [1944] 1 D.L.R. 139, affirmed [1944] S.C.R. 443, [1945] 1 D.L.R. 81, per Laidlaw J.A. at p. 814, referring to the speech of Lord Wright in *Winnipeg Electric Company v. Geel*, [1932] A.C. 690 at 695, [1932] 4 D.L.R. 51, 40 C.R.C. 1,

[1932] 3 W.W.R. 49. I think he, by excessive speed in the circumstances, put himself in a position where he was unable to avoid the slippery part of the hill and so lost control of his motor vehicle and slithered into the plaintiff.

The fact that four other cars, including the plaintiff's, had some difficulty on the hill does not alter my view, because perhaps they were also driven by negligent drivers or perhaps they were not so abundantly warned as was Morrison. I am very far from satisfied—in fact I do not believe—that only five cars travelled southerly down Bell's Hill in the space of about two hours after the injury to Newell.

That the onus is on Morrison has been held in similar circumstances in *Cook v. Boland Brothers Ltd.*, 49 Man. R. 318, [1942] 1 W.W.R. 306, [1942] 1 D.L.R. 790, where the plaintiff was standing beside his motor car when he was struck by the defendant's car. Similarly in *Ritchie v. Northern Petroleum Corporation Limited et al.*, 6 W.W.R. (N.S.) 672, [1952] 4 D.L.R. 540, the onus was held to be on the defendant when the plaintiff was run over by his own motor vehicle as the result of a collision.

Counsel for the defendant road authority argues that unless I find that Morrison has satisfied the onus there can be no claim for relief over by Morrison against his clients. He did not fully explain his point, but if I understand the argument it is that in the event of a finding of any negligence on the part of Morrison it follows that Morrison was not taking reasonable care in the circumstances for his own safety, that negligence was the proximate cause of the plaintiff's injury and so the want of repair is not material, and the chain of causation is broken as in *Doughty et al. v. Township of Dungannon*, [1938] O.R. 684, [1938] 4 D.L.R. 209. It is argued further that the plaintiff's claim against Morrison is in negligence and Morrison's claim is not for indemnity or relief over in respect of negligence but for want of repair.

I think this argument is unsound because s. 453(1) of The Municipal Act makes The Negligence Act, R.S.O. 1950, c. 252, applicable and The Negligence Act itself requires me to determine the degrees in which each of such persons is at fault or negligent. Section 2(1) of the latter Act provides: "Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the

degree in which each of such persons is at fault or negligent, . . .”

As between a plaintiff claiming damages because of non-repair and a municipality, The Negligence Act has been applied numerous times, for example, in *Bissell v. Township of Rochester*, 65 O.L.R. 310, [1930] 3 D.L.R. 825. I am of the opinion it applies here because of its express terms although the cause of action against the municipality is not in negligence. The accident was in part due to the municipality's fault or neglect in not repairing the road.

It was also argued that the defendant the County of York, having delegated its obligation to sand roads to an independent contractor, is not liable for fault of the independent contractor. The obligation of the corporate defendants is statutory. In *Groves et al. v. The County of Wentworth*, [1939] O.R. 138, [1939] 2 D.L.R. 375, it was held that a municipality could not avoid its statutory liability by delegating its obligation to an independent contractor.

I would assess the negligence of the defendant Morrison at 15 per cent. and the fault of the other defendants at 85 per cent. There was no negligence on the part of Newell causing or contributing to the accident. Counsel for the defendant corporations has relieved me of the task of deciding, as between the two, which should bear the liability by saying that should I find liability I may find it against both his clients.

The plaintiff has suffered injuries with resultant permanent disability; he sustained a fracture of the radius of the right arm and a fracture dislocation of his left hip. A large fragment at the back of the socket was broken off. According to his physician, he has a 20 per cent. loss of straightening movement in his arm and a loss of 100 degrees in the turning movement. He complains of weakness in the arm and difficulty in working with it in confined places. He suffers considerable discomfort in his left hip due to scarring at the line of fracture and is likely to suffer later from arthritis, although none has appeared as yet. His physician, I thought, did not regard either his injuries or the permanent disability as very serious. I thought his evidence greatly softened the pain and distress of which the plaintiff so strongly complained, and I am considerably influenced by the physician's evidence when I fix the plaintiff Newell's general damages at the sum of \$4,500. I allow his out-of-pocket dis-



bursements at \$1,344.84. I allow his claim for lost wages from his partnership company to the end of May 1952 at \$1,196. I allow him \$208, one-half his wages to 1st July, at which date he was able to resume manual labour. I see no reason to allow loss of wages beyond that date. The claim for loss of profits is not substantiated. His garage did not close. His partners were at work. The business went on. The connection between the accident and the loss of profits is too vague and uncertain to find that the alleged loss of profit was due to the plaintiff's absence from the garage. I fix his total damages at \$7,248.84.

There will be judgment against all the defendants for the sum of \$7,248.84 and costs of the action.

*Judgment accordingly.*

*Solicitor for the plaintiff: E. Lloyd Sparling, Toronto.*

*Solicitor for the defendant Morrison: Harry R. Rose, Toronto.*

*Solicitor for the other defendants: J. D. Lucas, Toronto.*

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[FERGUSON J.]

**Bermann and John Mackay Milling Limited v. Occhipinti and Occhipinti.**

*Master and Servant — Injury to Servant — Master's Cause of Action for Loss of Services — Measure of Damages — Loss of Profits.*

When a servant has been injured by the tortious act of a third person the master has a cause of action against the third person which is quite distinct from the servant's cause of action. The master's cause of action is based upon the loss of his employee's services, and the measure of the damages to which he is entitled is the loss that he has actually sustained through being deprived of those services. The worth of the services is not to be measured by the wages paid or agreed to be paid by the master, and the damages recoverable may include loss of profits by the master, provided that these are clearly established in the evidence to have resulted from the loss of services. *Receiver for the Metropolitan Police District v. Tatum*, [1948] 2 K.B. 68; *Attorney-General v. Valle-Jones*, [1935] 2 K.B. 209; *The King v. Richardson and Adams*, [1948] S.C.R. 57; *Flemington v. Smithers* (1826), 2 C. & P. 292; *Mankin et al. v. Scala Theodrome Company Limited*, [1947] K.B. 257, considered and applied.

AN ACTION for damages.

18th November 1953. The action was tried by FERGUSON J. without a jury at Toronto.

*E. A. Richardson, Q.C.*, for the plaintiff company.

*J. H. Amys, Q.C.*, for the defendants.

27th November 1953. FERGUSON J.:—This action arises out of injuries sustained by the plaintiff Leo Bermann when he was run down on a street in Toronto on 2nd February 1952 by an automobile owned by the defendant Manuel Occhipinti and driven by the defendant George Occhipinti.

As the style of cause indicates, the writ was issued on behalf of both plaintiffs. I am informed by counsel that the claim of the plaintiff Leo Bermann has been settled upon payment to him of \$2,300 in full of all his damages sustained in the accident.

The only question before the Court is whether or not the defendants are liable for loss alleged to have been sustained by the plaintiff John Mackay Milling Limited as a result of the plaintiff Bermann's injuries in consequence of which the company was deprived of his services.

The plaintiff Bermann is the secretary-treasurer, a director and general manager of the plaintiff company, which carries on the business of a miller at the town of Bowmanville. His injuries in the accident confined him to the hospital for seven days. He was then confined to bed at home for a period of two weeks and was unable fully to resume his work until the end of April.

By-law no. 1 of the company contains the usual provision that the terms of employment and remuneration of the officers shall be settled from time to time by the board. By an agreement in writing dated the 21st August 1950 the company agreed to engage the plaintiff Bermann as manager at a monthly salary of \$250, and by a second agreement dated the 8th May 1951 the company again agreed to engage the services of Bermann, "who shall be required to devote his whole time and attention for and on behalf of the company and shall receive there for the sum of \$300.00 per month, plus an additional \$75.00 per month, as travelling expenses". Although these agreements are executed under the corporate seal there is no by-law of the company, unless it be that part of by-law no. 1 previously referred to, approving them. The plaintiff Bermann did not in fact draw \$300 per month. He says he took \$200 monthly and \$75 for expenses, subject to adjustment at the end of the year.

The plaintiff Bermann, in the year 1950, purchased the milling business of the predecessor of the plaintiff company and

was the promoter and organizer of the plaintiff company. Some new shareholders were brought in in the year 1951 when the capacity of the mill was greatly extended. At the date of the accident the plaintiff was the owner of 40 per cent. of the issued capital stock and, although he was not in control of the share capital, in the sense that he did not own a majority of the shares, yet, being the only experienced miller in the organization, he managed and controlled its affairs.

After the organization of the plaintiff company the business was extended by Bermann by the introduction and sale of pot barley and by the introduction of mixed grain and barley feeds for animals. The mill operated by the plaintiff company was a processing-mill. The products, with the exception of cream of barley, sold as cereal, had to be bagged up at the mill and shipped. The plaintiff Bermann stated that the staff in the mill was quite small and there was no one either in the office or in the mill other than himself who understood the processing of the grains or the arrangements for shipping, nor were any of the staff except himself familiar with the customers or where sales might be made.

At the date of the accident there were five cars of processed grain at the mill ready for sale and a number of cars of unprocessed grain on railway sidings or about to be placed on railway sidings for delivery to the mill. Bermann says that the result of his being unable to be at work was that it was impossible for the plaintiff company to sell the processed stock. In fact, it was impossible to get it out of the mill, and therefore the principal customer, Inter-Continental Grain Company, would not release the cars on the railway siding to the mill, and as a result the plaintiff company had to pay demurrage charges amounting to \$1,383; it was forced to allow the Inter-Continental Grain Company to take over the sale of the processed grains with a loss of \$2,333.07, and there was a general loss of profits in the operations.

There is no doubt on the evidence that the plaintiff company paid the demurrage charges claimed. I do not think that the loss on what Mr. Bermann calls the forced sales, that is, the sales of processed grain made by Inter-Continental Grain Company, has been proved. The plaintiff company invoiced the grain to the Inter-Continental company provisionally at \$67 per ton. That company invoiced the grain to its customer provisionally



at \$65 per ton, but it was not sold at that figure but at a figure somewhat less. No evidence, except Mr. Bermann's, was called to prove that the grain could have been sold at \$67 anywhere had Mr. Bermann been available. Moreover, he did not demonstrate his point. No one was called to say that he would have bought at \$67 or any other figure, nor was there any evidence that \$67 was the market-value of the processed grain.

As for the profits alleged to have been lost during the period of time when Mr. Bermann was suffering from his injuries, no proof was offered of any losses other than those incurred in connection with the forced sales. The plaintiff submitted figures showing its gross income commencing with November 1951 to April 1952, and showing that the income for the three months preceding the 1st February 1952 was \$86,863.92 and that the income for the three months ending with the last day of April was \$50,184.90, making a difference of \$36,679.02, but there the proof ended.

The company had a board of five directors. No meeting of the board was called after the accident. There does not appear to have been any effort made to obtain a substitute for Bermann. I am far from satisfied that Bermann's services were as indispensable as he says. His customers were well known. The staff must have known the milling routine. I most certainly do not accept his story that his staff of workmen were incapable of bagging up and shipping the processed grain in his absence when, admittedly, they had been doing it under Bermann's supervision for some time past. Bermann's appearance was that of an office man. I doubt very much whether he has bagged or lifted a bag of grain for some years past. One can readily understand that some delay and hesitation must have resulted in consequence of the absence of the directing head of the mill, and for that reason I think the demurrage is in a somewhat different category from the loss of profits, but I cannot make a finding of loss of profits on the bald statement that such is the fact; there must be proof satisfactory to the Court.

The income for the months February, March and April 1952, was much larger than that for the same months in the year 1951, but the matter is confused by the fact that new capital was brought into the business in August 1951 and the capacity of the plant was greatly increased. I cannot assess damages on such

vague and uncertain testimony and I do not think that the loss of profits has been proved.

The cause of action of the company is quite different from the cause of action of the plaintiff Bermann. It is based on the ancient common law principle that a master who has, by the tortious act of a third person, been deprived of the services of a servant, may claim damages in respect of that deprivation against the third person who has brought it about. It has been resorted to and kept alive in cases of seduction as the basis by which the seducer is made to pay for his wrongdoing. It has been well settled by many cases that when, by the tort of a third person, the master loses the services of his servant, he can recover damages in respect of that loss of services. The question in this case is: What is the loss, if any, which the company is entitled to recover from the defendants for the loss of Bermann's services, and what factors enter into the measure of the damage suffered?

It was argued by counsel for the defence that there was no principle of law on which the defendants could be liable. In Salmond on Torts, 11th ed. 1953, at p. 406, the learned author states the law as follows:

"It is a tort actionable at the suit of a master to . . . cause bodily harm to his servant, if (1) the act is a tort as against the servant, and (2) the master is thereby deprived of his servant's services."

The case cited as authority for that statement is *Receiver for the Metropolitan Police District v. Tatum*, [1948] 2 K.B. 68, [1948] 1 All E.R. 612. That was a case where the receiver, having paid the hospital charges and wages and allowances during the disablement of a police officer injured through the negligence of the defendant, brought action to recover from the defendant the sums so paid. It was held that the receiver, being compelled, by statutory regulation, to pay the wages of the injured officer, was entitled to be indemnified by the defendant.

There are many other cases where the above principle of law has been applied. In *Attorney-General v. Valle-Jones*, [1935] 2 K.B. 209, two aircraftsmen brought action for damages for personal injuries sustained in a collision between a motorcycle and the defendant's motor-lorry. They recovered damages, not including wages, rations and hospital expenses as these had been supplied by the Royal Air Force. The Crown then brought action

to recover from the defendant damages for loss of services of the two aircraftsmen by the tortious act of the defendant's driver. It was held that the Crown was entitled to maintain a claim against the defendant for loss of service of the men by the tortious act of the defendant's driver, and to recover any damage which it had thereby suffered, and that the measure of damages was the amount of the wages and rations of the men during their incapacity and of the expenses of their hospital treatment, the amount of which expenses, if they had not been borne by the Crown, could have been recovered by the men from the defendant as damages. MacKinnon J. at p. 216 of the report said:

"It is well settled that when by the tort of a third party a master has lost the services of his servant he can recover damages in respect of that loss of service. The amount of his damages is, of course, dependent upon the facts of the particular case."

In that case the Crown recovered the amount of the pay and allowances paid to the men, not as an expense, but as the value of the services lost, and hospital expenses incurred on behalf of the men. No other damages were in question.

In our own Courts, *The King v. Richardson and Adams*, [1948] S.C.R. 57, [1948] 2 D.L.R. 305, was a case where an officer in the military forces of His Majesty in right of Canada was injured while a passenger in a motor vehicle on a highway in the Province of Ontario. He was confined to the hospital and while he was incapacitated the Crown continued to pay him his military pay and also paid for his medical and hospital treatment. The law and the cases were reviewed at great length. It was the opinion of all of the judges that the Crown's claim for disbursements for medical and hospital expenses was properly allowable. It was also held, Kellock J. dissenting, that the Crown's claim for pay and allowances was properly allowable as the fact of such payment was some evidence, and therefore sufficient evidence, of the value of the services that were lost to the Crown. It was argued by counsel for the defendants that the loss of the servant's services must be measured by the master's assessment of his worth, that is, the amount of wages the master pays. In this particular case it is urged, therefore, that the damages for loss of Bermann's services can be no more than \$300 for each month he was incapacitated and as the limited company did not pay him during the three months he was incapacitated, and as he has accepted an amount from the defend-



ants as damages for loss of wages, no damages can be recovered by the company.

I have not been referred to any case in our own Courts where a claim has been made for damages such as those claimed in this action.

In Blackstone's Commentaries, Book III, p. 142, it is stated: "The other point of injury is that of beating . . . or disabling a man's servant, which depends upon . . . the property which the master has by his contract acquired in the labour of the servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant himself as an individual may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action of trespass *vi et armis*; in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit*; and then the jury will make him a proportionable pecuniary satisfaction."

In *The King v. Richardson and Adams*, *supra*, Kerwin J. at p. 63 quotes with evident approval from the charge of Chief Justice Abbott to the jury in *Flemington v. Smithers* (1826), 2 C. & P. 292, 172 E.R. 131, as follows: "With regard to the amount of damages, I should tell you, that this action is brought to recover such sum as you (the Jury) may think the plaintiff entitled to for the loss of the services of his son. You ought, therefore, if you find for the plaintiff, to find for such reasonable sum as to you appears proper for the loss the plaintiff has sustained in being deprived of the assistance of his son, and also the expense he must have been put to by his being out of his place, and also some small compensation for his mother going to visit him as she did. But beyond those things it appears to me, that you ought not to go in your estimate of damages."

At p. 64 Rand J. points out that:

"Damages ordinarily repair injury to economic interests in which the loss is measurable in monetary units . . .

"But I see no distinction in principle between the deprivation of such services and the deprivation of the use of property that could not be given commercial employment; and as the allowance for the latter is well settled, *The Greta Holme*, [1897] A.C. 596, it would seem to follow that, generally, lawful objects and purposes which the services of men or the use of things are designed

to achieve are interests, the wrongful and injurious affection of which must be answered in damages."

And at p. 65 he says: "Now, it would be impossible to measure that loss in terms of accumulated minutiae of inconvenience, and any rule applied must be somewhat arbitrary. The consideration is not irrelevant that if the injured person was paid only for actual service, he could recover for the time lost on the basis, having regard to all likely contingencies, of his remuneration."

As I have said, the right of the master to recover loss of profits as damages has not, so far as I am aware, come before our own Courts for decision although the passages which I have referred to in the case of *The King v. Richardson and Adams* seem favourable to the right of the master to recover any special damage suffered.

However, the point seems to have been decided in a case to which I was not referred by counsel, namely, *Mankin et al. v. Scala Theodrome Company Limited*, [1947] K.B. 257, [1946] 2 All E.R. 614. There, the plaintiffs together constituted a music-hall turn, the first plaintiff being employed by the second. The plaintiffs were performing at a theatre of which the defendants were the owners and occupiers when, owing, as the plaintiffs alleged, to the defective condition of the stage by reason of the existence of a loose board of which the defendants knew, the first plaintiff's left foot went through the flooring of the stage and he was injured. As a result, the first plaintiff was unable for some time to perform his part of the turn and his wages were accordingly reduced from £10 a week to £2 10s. Consequent on the first plaintiff's injuries, the amount received by the second plaintiff for the turn was reduced from £40 a week to £30, while the full performance could not be given, and for a time the second plaintiff had to take temporary work at £10 a week. The first plaintiff claimed damages in respect of personal injuries and loss of earnings and the second plaintiff damages for the loss of the services of his servant. It was argued in that case by counsel for the defendants, as it has been in the case at bar, that the loss of the servant's services must be measured by the master's assessment of his worth, that is, the wages the master paid. It was also argued that *Attorney-General v. Valle-Jones*, *supra*, was no authority for the proposition that the master might claim loss of his own earnings. It was held by Stable J. that the damages were

not confined to the wages paid or agreed to be paid. He pointed out that the cause of action of the master was quite different from that of the servant. He held that the damages should not be confined within such narrow limits as those suggested by counsel for the defendant "and that in each case one must ascertain what was the direct consequence to the master of the loss of his servant's services", and he awarded damages for the loss sustained by the master as the direct result of being unable to use the servant's services in the way in which he would have used them had the servant not been injured.

I agree with that decision. It appeals to me as being sound in principle and in keeping with the general principles for assessing damages. I have not dealt with the validity of the plaintiff's contract as the liability of the defendant is the same whether the services are contractual or *de facto*: Salmond, *op. vit.*, p. 361. I think, therefore, the plaintiff company must have judgment for the demurrage charges of \$1,383, but not for the alleged loss on the processed grain, or the alleged loss of profits. There will therefore be judgment for the plaintiff company against the defendants for \$1,383 and costs of the action.

*Judgment accordingly.*

*Solicitor for the plaintiffs: E. A. Richardson, Toronto.*

*Solicitors for the defendants: Hughes, Agar, Amys & Steen, Toronto.*





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